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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

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MILLER *v.* SAME.

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Workmen's Compensation—Fatal Accident—Compensation—Dependent Widow—Payment into Court by Employers with admission of Liability—Subsequent death of Widow before claim adjudicated upon—Claim by her next of kin—Claim by Employers to repayment out of Court—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 2, *sub-s.* 3*—Workmen's Compensation Rules,* 1926, *r.* 61, *sub-rr.* 1, 2, 3, 7 ; *Form* 55.

On November 15, 1933, a workman lost his life at sea whilst working as fireman on the employers' ship. His dependants at that date were his wife and his father and mother. On January 2, 1934, the employers paid 300*l.* into Court under r. 61 of the Workmen's Compensation Rules, 1926, with an admission of liability. On January 10, 1934, eight days later, the workman's widow died, before her claim had been adjudicated upon. On April 21, 1934, the county court judge awarded 100*l.* to the

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workman's father and mother and 200*l.* to the father of the widow as her next of kin and refused an application of the employers for repayment to them of any part of the money paid into Court.

On appeal by the employers as to the award of the 200*l.* :—

Held (reversing the decision of the county court judge), having regard to s. 2, sub-s. 3, of the Workmen's Compensation Act, 1925, and r. 61 of the Workmen's Compensation Rules, 1926, that as at the time of the widow's death no agreement or award had been arrived at or made, she acquired no right or vested interest in the compensation and that her next of kin could therefore make no claim to the money.

Held, therefore, that so much of the award must be discharged as directed payment of the 200*l.* to the next of kin of the widow, and that sum must be ordered to be repaid to the employers.

Appeal from an award of the judge of the Cardiff and Barry County Court sitting as arbitrator under the Workmen's Compensation Acts.

The facts are fully stated in the judgment of Lord Hanworth M.R. and were shortly as follows :—

Sidney George Morgan, a fireman on the steamship *Saxilby* belonging to the Ropner Steamship Company, lost his life when that ship foundered in the North Atlantic on November 15, 1933.

At that date his dependants were his wife, Susie Morgan, and his father and mother, William John and Alice Morgan.

The employers admitted liability, and on January 2, 1934, paid 300*l.* (less 10*l.* which they had advanced to the father and mother) into Court under r. 61 of the Workmen's Compensation Rules, 1926.

On January 10, eight days later, Susie Morgan, the deceased workman's widow, died.

On April 21, 1934, the county court judge awarded 100*l.* of the money paid into Court to the father and mother and the remaining 200*l.* to Thomas A. Miller, the father and next of kin of Susie Morgan, and refused an application of the employers for repayment to them of any part of the sum paid into Court.

The employers appealed from so much of the award as directed payment of the 200*l.* to Miller.

The appeal was heard on June 1 and 5, 1934.

Carey Evans for the appellants.

1. The claim of the respondent Miller as the next of kin of Susie Morgan is definitely barred by s. 2, sub-s. 3, of the Workmen's Compensation Act, 1925. That sub-section provides that "Where a dependant dies before a claim under this Act is made, or if a claim has been made, before an agreement or award has been arrived at or made, the legal personal representative of the dependant shall have no right to payment of compensation, and the amount of the compensation shall be calculated and apportioned as if that dependant had died before the workman." The county court judge was therefore wrong in disregarding the plain words of the sub-section.

2. In any event, even apart from s. 2, sub-s. 3, the amount of the compensation must be limited to the loss sustained by the widow by the death of her husband. Before the Act of 1923, which first introduced the provision in s. 2, sub-s. 3, it was decided in *Phillips* v. *Kershaw, Leese & Co.* (1) that the widow in that case having died before the assessment of compensation, no speculation as to the expectation of life was necessary: the facts were ascertained, the injury was ascertained, and that injury alone was what had to be considered in ascertaining the compensation. The judge in the present case could have awarded a sum based on the loss to the widow during her life.

3. As there was here no award or agreement arrived at before the widow's death under s. 2, sub-s. 3, the Court had, it is submitted, a discretionary power under r. 61 to order payment back to the employers of part of the money paid into Court. It is no part of the scheme of the Act that money should be awarded as a kind of windfall to a person who was in no way a dependant of the deceased workman. The right of the next of kin of a dependant does not arise until after there has been an agreement or an award under s. 2, sub-s. 3. Here the widow never did anything to indicate her agreement. The material date to be considered is when the money paid into Court has to be apportioned. *United Collieries, Ld.* v. *Simpson* (2) does not apply to present case, as no award having been made, the next of kin cannot now allege that he

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(1) [1920] 3 K. B. 297. (2) [1909] A. C. 383.

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stands in the widow's shoes. The widow had acquired no vested right in the money before her death.

Trevor Morgan for the respondent Miller. The widow's personal representative ought not to be in a worse position than the widow would have been if the county court procedure had enabled her to take the money out of Court immediately it was paid in. If the registrar thinks that the money paid into Court is adequate the employers have no further interest in it. Here the payment into Court was a voluntary payment by the employers with an admission of liability. The employers are therefore bound by their election, and s. 2, sub-s. 3, of the Act of 1925 does not apply.

Even if the sub-section does apply the employers are estopped from saying that no agreement was arrived at: *Carr* v. *London and North Western Ry. Co.* (1)

There is no machinery provided by the Act of 1925 or the Rules for payment back to employers of money paid into Court in circumstances like those in the present case.

Carey Evans in reply.

Lord Hanworth M.R. This appeal must be allowed. It raises a novel and interesting point and it comes before us on appeal from the learned county court judge, who came to a decision that the employers were not entitled to receive the balance of a sum paid into Court after the liability which fell upon that fund had been provided for. The way in which the matter was actually brought before the county court judge may have been somewhat irregular, but I think we have to deal with the order which he made, which was a refusal to allow any sum being part of a fund then in Court, to be paid out to the employers.

The facts are quite simple. The workman, Sidney George Morgan, was drowned at sea on November 15, 1933, and there is no doubt that his death was the result of an accident arising out of and in the course of his employment. On January 2, 1934, the employers made a payment into Court and filed a præcipe of that date in the form which is prescribed by Form 55, saying that they had paid the money into Court in respect of their liability to the dependants of the workman, and they stated, in accordance with the terms of that form, that the persons who were treated by them as dependants were the father and mother of the deceased, who were partially dependent upon him, and his widow, Susie Morgan. When that form is looked at it will be seen that the employers had, when paying into Court, to issue this præcipe, which is to be found on p. 718 of the 29th ed. of Willis's Workmen's Compensation. The last statement upon that præcipe is: "To the best of [my] knowledge and belief the persons interested in the said sum as dependants of the [deceased] are" so and so. The payment into Court was a payment of 290*l.*, which together with a sum of 10*l.* paid on account brought up the total under the jurisdiction of the Court to 300*l.*, which was the total liability which could be imputed to the employers. It is true that on January 2 when the employers made the payment into Court the widow was alive, as were also the father and mother of the deceased workman. The wife as a matter of fact was an inmate of a mental hospital under the control of the Glamorgan County Council. On January 10 she died. As I have said, the payment in by the employers was made under r. 61, which provides for the possibility of payment into Court where a liability is admitted by the employers but the amount of that liability has not been ascertained. By sub-r. 1 it is provided: "If there is no dispute as to the liability to pay compensation, but the amount payable has not been ascertained or decided either by a committee or by arbitration or by agreement, the employer may pay the amount which he admits to be payable as compensation into the Court to which, if an agreement had been come to in the matter, a memorandum of such agreement would be sent to be recorded." The employer gets this advantage, that under sub-r. 9 of the same rule, when that money has been paid into Court, the employer is not liable for any costs incurred by any person interested in such money after the receipt of the notice of payment into Court. Hence it is some advantage to the employer to be quit of further liability for costs and to measure his liability and pay the money into Court. What happened afterwards was this. The registrar has a duty when the money is paid into Court under sub-r. 1 of r. 61 to make inquiries and to decide under sub-rr. 3, 4 and 5 whether the money is adequate or inadequate. On January 27 the registrar reported to the judge that in his view the amount paid in was inadequate, and thereupon under sub-r. 7 it became the duty of the judge, on consideration of the registrar's report, to have a notice sent out to the parties interested, that is to the dependants and also to the employers, informing them that the matter had been referred to the judge and requiring them to attend on a day when the matter would be inquired into by the judge, and " on such inquiry the judge may make such order (including an order as to the money paid into Court) as under the circumstances he may think just."

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(1) (1875) L. R. 10 C. P. 307.

When the inquiry took place before the judge, the father of the deceased wife, Mr. T. A. Miller, alleged that he was the next of kin to the deceased wife, and he proved that that was so. It is said that he could stand in the place of the wife and claim the money which, if she had continued to live, would have been payable to her. The county court judge has held that having paid this total sum of 300*l*. into Court with an admission of liability, the employers have no locus standi in respect of any portion of it, and could not be heard to say that in the events which had happened the amount paid into Court was more than was necessary to meet the liabilities falling upon the fund. Hence he held that there was a right on the part of the next of kin, that is the father, to receive such portion as could be rightly appropriated to the dependency of the widow.

On the appeal it is argued before us that in the circumstances of the present case there is no finality reached by the payment of the money into Court, and that when the matter came before the county court judge for his determination the fact of the death of the widow on January 10, eight days after the payment into Court, had so altered the dependency, which the money was paid into Court to meet, that there was a balance which ought to be paid out to the employers; that they never would have made so large a payment into Court if the wife had died before the question of her dependency fell to be determined.

Our attention was called to an important section derived from the Act of 1923, and not to be found in the earlier Act of 1906. It is now sub-s. 3 of s. 2 of the Act of 1925, and provides as follows: "Where a dependant dies before a claim under this Act is made, or if a claim has been made, before an agreement or award has been arrived at or made, the legal personal representative of the dependant shall have no right to payment of compensation, and the amount of compensation shall be calculated and apportioned as if that dependant had died before the workman."

In the present case it is plain from the decision reached by the registrar that the 300*l.* placed under the control of the Court was inadequate, that there had been no agreement or award made, and that the matter was still open for determination by the county court judge. The result, therefore, was that s. 2, sub-s. 3, did apply, and in the present case we have to treat the death of Mrs. Susie Morgan as having taken place before the death of the workman on November 15, 1933; in other words, he is to be treated as having died at a time when he had no wife at all.

But it is argued by Mr. Trevor Morgan that when r. 61 is examined there is ground for saying the 300*l.* has passed away from the employers and that they can have no right or title to any repayment because they have admitted a liability up to 300*l.*; and that, following such cases as *Carr* v. *London and North Western Ry. Co.* (1) and other cases of estoppel, there is a finality about that payment into Court and the employers are estopped from saying that their liability to the dependants was any less than 300*l.* I think that an examination of r. 61 defeats that argument. It will be seen that when the money has been paid into Court the duty of the registrar arises to make his inquiries as to how far the statement made in the præcipe of the employers is accurate. All that the employers had said was that to the best of their knowledge and belief certain persons were

(1) L. R. 10 C. P. 307.

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dependants. The registrar has to render that fact of dependency certain. By sub-r. 3 he is to make inquiries, and it is the duty of the employer and the persons interested to answer inquiries, and then under sub-r. 4 he has to send out a notice to the persons interested. It is important to see what notice he has to send out. It is Form 58 (ii.): "Take notice that the sum of £ has been paid into Court as compensation in the above-mentioned matter. If any question arises as to the adequacy of the amount paid into Court, such question, and all questions as to who are dependants, and the amount payable to such dependants, must be settled by arbitration in accordance with the above-mentioned Act and the Rules of Court made under the said Act." That notice, which has of course statutory authority, seems clearly to indicate that questions as to who are the dependants and what is the amount payable to such dependants, are not made certain or final by the mere payment into Court; the amount is subject to investigation as to its adequacy and as to the number of dependants who are entitled to make a demand, subject to the investigation by the registrar; in other words, that notice seems to repel finality. Then after the registrar has reported, if, as in the present case, he is dissatisfied with the amount paid into Court, the matter comes before the county court judge under sub-r. 7, and he on such inquiry is to "make such order (including an order as to the money paid into Court) as under the circumstances he may think just." It seems that the employers are entitled to say, that having regard to the fact that Mrs. Susie Morgan is to be deemed to be dead before her husband died, there cannot be any dependency in respect of her, and if that fact had been known at the time when the payment was made into Court the employers would have paid in a smaller sum. That matter is still open, because under sub-r. 1 the code of rules applies where, although there is no dispute as to the employers being liable to pay something, the amount payable was not ascertained or decided by arbitration or by agreement at the time when the payment was made into Court. It was therefore open to the employers under sub-r. 7 to come forward and ask for the payment out, as in justice to them, because their position has now to be determined and it had never been determined before the matter came before the county court judge.

For these reasons it appears to me that the county court judge has misdirected himself in holding that the employers had no locus standi or that finality was reached in the matter at the time when the payment was made into Court.

The appeal, therefore, must be allowed, and I will deal with the question of what is the right order when my brother judges have given their decision.

SLESSER L.J. I am of the same opinion. Rule 61 appears to me to contemplate that the amount has not yet been ascertained, although payment in may be made by the employer with an admission of liability. On that payment in two things may arise. The registrar may come to the conclusion that the amount paid in is adequate. In such a case he is to send by post to each of the persons interested a notice of the payment—that is under sub-r. 4—and on such a notice of payment being so sent, it is provided by sub-r. 8 (*b*): "If no question arises as to the adequacy of the amount paid into Court, the amount paid into Court shall be allotted, invested, applied, or otherwise dealt with by the Court in accordance with" para. 8 (*b*) of r. 60. Para. 8 (*b*) of r. 60 says this: "If any question arises as to who is a dependant or as to the amount payable to any dependant, or otherwise as to the application of the sum paid into Court, such question shall be settled by arbitration in accordance with the Act and these Rules." So that in the case of a payment in under r. 61, where the registrar is of opinion that the payment in is adequate, it is clear from the very terms of the rule and the machinery applied to it that there may be still matters falling to be determined and that in itself will not be a final order vesting the matter; there is still a right of the persons interested to be heard.

Now that was not this case. In this case the registrar

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thought the payment in was not adequate, and he, therefore, ordered the matter to go to the county court judge. The case fell under sub-r. 7 of r. 61, which is as follows: "If on consideration of the registrar's report it appears to the judge that further inquiry should be made, the registrar shall send notice to the employer and to the parties." It will be observed that in that case there is a direct instruction to give a notice to the employer. The county court judge in his judgment has come to the conclusion that the employers here, by reason of the payment in, were not parties interested in the money paid into Court, and he appears to have thought for that reason, among others, that the employers had no locus standi. We are told very frankly at the Bar that that view cannot be supported under sub-r. 7, and it is clear that the employers there on the very terms of the rule have the right to have the notice sent to them; and having the notice sent to them it is provided that on the inquiry sub-r. 7 of r. 51 shall apply. That sub-rule provides: "At the hearing witnesses may be orally examined in the same manner as on the hearing of an action. The judge may also at or for the purpose of the hearing give such directions as he may think just." So that it is clear that so far from the matter being determined at that stage, it is still open for the judge to have seisin of the whole matter. In particular it is provided (r. 61, sub-r. 7): "On such inquiry the judge may make such order (including an order as to the money paid into Court) as under the circumstances he may think just." I agree in view of those provisions that it is impossible to say the money was vested in the widow at the time it was paid into Court; if the money did not vest in the widow so that it became the right of the legal personal representative, then I think the provisions of the Act of 1925, sub-s. 3 of s. 2, must operate to prevent that legal personal representative having any rights in the circumstances here obtaining. I am prepared to assume in favour of Mr. Miller that a claim had been made on or before January 2; I think it is fair to make that assumption because Mr. Richards, the secretary of the Employers' Federation, writing to Mrs. Susie Morgan, to Mr. Morgan, the father, and to Alice Morgan, the mother of the deceased man, says: "I beg to give you notice that the sum of 290*l.* has now been paid into the Cardiff and Barry County Court in settlement of your claim." He should have said: "of all your claims in respect of the above mentioned matter." That was on the same day on which it is recorded in the notice of the registrar that that sum had been so paid in. Therefore, this may be said to be the case: the widow having died on January 10, if a claim has been made before an agreement or an award has been arrived at, the legal personal representative shall have no right. The claim, as I say, was made, and it is impossible in my view to say any agreement or award has been arrived at or made. There is no question here of an agreement, and this payment in cannot in any way be said to be in the nature of an award. At the time of the widow's death the judge had not then disposed of the matter; he had not given his final directions and no award had been made. Therefore unless it can be said—and I think it cannot be said—that this money had already vested in the widow on payment in so that the statute could have no operation, it is clear that once the legal personal representative cannot claim the money on that heading, sub-s. 3 of s. 2 operates to prevent him claiming. Had an award been arrived at within the meaning of sub-s. 3, he would have been entitled to claim the money, as he would have been entitled to claim it in the earlier case of *United Collieries, Ld.* v. *Simpson.* (1) It is no longer possible since 1923 for a legal personal representative, when no award has been made, to say he stands in the dependant's shoes.

For these reasons I agree that this appeal should be allowed.

Romer L.J. I agree. I find the case one of some difficulty. The case of the respondent may be put in two ways. It can be suggested in the first place that where money is paid into Court by an employer under r. 61, all that a registrar and the Court have to do is to ascertain whether the sum was adequate at the time of the payment in, and for that

(1) [1909] A. C. 383.

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purpose all that the registrar or the Court has to ascertain is: who are the dependants at the date of the payment of the money into Court, in which case the dependants are to be treated as though at the time of such payment, an award had been made in their favour of the sum which subsequently, by reason of the provisions of the rule, becomes payable to them. If that is the effect of a payment of money into Court, it is obvious that each dependant—that is to say each person who could establish his or her right as a dependant at the date of the payment—would have obtained a vested interest in the money paid into Court although the precise quantum of that interest might not be ascertained until later. When ascertained, if that be the true view of the rule, it would be ascertained as at the date of the payment into Court. In that case, of course, the death of the widow, which happened in this case eight days after the payment of the money into Court, would have been wholly inoperative to deprive her estate of the interest in the money which she would have received had she continued to live. I do not think, however, on looking at the rule carefully, that it is possible to put that construction upon it. It will be sufficient, I think, to refer to sub-r. 8, which is providing as to what is to happen after the money has been declared by the judge or the registrar to be adequate and the notice is given to the dependants under sub-rr. 4 or 6. In that event the sub-rule provides: "If any question arises as to the adequacy of the amount paid into Court"—that of course contemplates that the dependants may not agree with the view of the registrar or the Court that the sum paid in was adequate—"the question as to the amount payable as compensation, and all questions as to who are dependants and the amount payable to each dependant, shall be settled by arbitration." Observe that it does not say: "Any question as to who were dependants at the date of the payment into Court." It appears to be contemplating a question which has to be determined in accordance with the circumstances existing as at the date when the inquiry is being made; that is to say, when the arbitration is being held. Another way in which the respondent's case is put is this. It is said, and I think truly said, that s. 2, sub-s. 3, of the Act of 1925 is contemplating, and only contemplating, the case of a dependant who has the opportunity of making a claim and of subsequently obtaining compensation by an agreement or by an award and yet dies before having taken those opportunities; and it is said that in the case of a dependant in respect of whom or in respect of whose claim money is paid into Court under r. 61, that dependant is not such a person, because by virtue of the payment into Court the dependant is precluded from obtaining an agreement or obtaining an award. Now I have felt the force of that argument. I think it is that argument to which the county court judge acceded, but when one looks at the rule carefully it will be found that in some cases the claimant has an opportunity of actually obtaining an award, and in all other cases, that is to say, cases where he does not have an opportunity of obtaining an award, he has an opportunity of obtaining an order of the Court in his favour. I think it may well be said that the opportunity of obtaining that order is to be treated as an opportunity of obtaining an award within the meaning of s. 2, sub-s. 3. Where the money paid into Court is adjudged by the registrar or by the judge on the report of the registrar to be adequate, the provisions of sub-r. 8, as I have already mentioned, come into operation. It is to be observed that the notice which is given under sub-rr. 4 and 6, which are to be found in Form 58 (ii.) to the Rules, expressly states what courses are open to the dependants to whom the notice has been addressed. It says: "If any question arises as to the adequacy of the amount paid into Court, such question, and all questions as to who are dependants, and the amount payable to such dependants, must be settled by arbitration." That is the case in which, as I have said, an opportunity is given to a claimant to obtain an actual award after the payment of the money into Court. Then the notice goes on as follows: "If no question arises as to the adequacy of the amount paid into Court, any person interested in the said sum may apply to the Court for an order for the investment and application of the said sum for the benefit of the persons entitled thereto." That is one of the cases to which I referred just now; an award will not be obtained, but an order will be obtained. It may well be that the opportunity of obtaining that order is to be treated as the opportunity for obtaining an award, which is contemplated by s. 2, sub-s. 3, so that a dependant who dies before obtaining that order may be said to fall within the mischief of that sub-section. A similar thing happens if instead of a notice being given under sub-r. 4 or sub-r. 6, the county court judge comes to the conclusion that further inquiries should be made after he has read the registrar's report. In such a case sub-r. 7 provides that a notice shall be sent to the parties interested and to the employer informing them that the matter is going to be inquired into by the judge, and the sub-rule says: "On such inquiry the judge may make such order (including an order as to the money paid into Court) as under the circumstances he may think just." In every case, therefore, after money has been paid into Court, there is an opportunity either of obtaining an award or of obtaining an order. That being so I think such a dependant comes within the mischief of s. 2, sub-s. 3, even although in some cases the dependant may not come within the actual strict wording of the section.

For these reasons I think this appeal must be allowed.

The Court directed that so much of the order of the county court judge as awarded 200*l.* to the respondent Miller should be discharged, and that the 200*l.* should be repaid to the appellants.

Appeal allowed.

Solicitors for appellants: *Botterell & Roche, for Donald Maclean & Hann, Cardiff.*

Solicitors for respondent: *Elfyn David & Hamblen, Cardiff.*

W. I. C.

Followed. MILLS *v.* BRYCE [1951] 1 K. B. 757

Applied. DEAN *v.* BRUCE [1952] 1 K.B. 11

PHILLIPS *v.* COPPING.

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1934
June 26, 27, 28.

[1932. P. 418.]

Landlord and Tenant—Rent restrictions—House let at less than standard rent—Expiration of contractual tenancy—Right of landlord to increase rent to standard rent—Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 1, 2, 3 *—Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 8, *sub-s.* 2.

Where a dwelling-house has been let at a rent lower than the standard rent a landlord is entitled, on terminating the tenancy, to give notice raising the rent to the standard rent.

Dufty v. *Palmer* [1924] 2 K. B. 35 overruled.

Decision of Divisional Court reversed.

APPEAL from a decision of Lord Hanworth M.R. and Romer L.J. sitting as a Divisional Court affirming a judgment of an Official Referee.

The plaintiff, the owner of a dwelling-house in the occupation of the defendant, Mrs. Copping, claimed to recover 278*l.* 15*s.*, being 142*l.* 15*s.* in respect of rent and 136*l.* 10*s.* in respect of money lent and interest.

The plaintiff let the house in question to the defendant in 1916 on a three years' agreement at 47*l.* 10*s.*, with an option for a further three years' tenancy at 55*l.* On July 13, 1922, the plaintiff alleged that he served a notice on the defendant increasing the rent; this notice, a copy of which he produced, stated that "I intend to increase the standard rent of 65*l.* per annum by the amount of 26*l.* per annum" with increases under heads (*c*) and (*d*) of s. 2 of the Rent, &c., Act, 1920. The writ in the action accordingly claimed rent owing at the rate of 91*l.* per annum, and also the amount alleged to be due for money lent.

In proceedings under Ord. XIV., the claim was remitted for trial to an Official Referee. Before him the defendant alleged (1.) that the notice of increase of rent had never been served, (2.) that the copy produced by the plaintiff showed that it was incorrect in claiming that the standard rent was 65*l.*, and (3.) that having paid rent since 1922 at the rate of

91*l.* per annum, which was not legally exigible, she was entitled to recover the amount of such overpayments—namely, 93*l.* The claim under the bill of sale was given up.

The Official Referee held that although the standard rent of the house was 65*l.* no effective notice of increase of rent was proved to have been served on the defendant, that in paying rent at 91*l.* she had overpaid the plaintiff, that nothing was due to the plaintiff on the claim, and that the defendant was entitled to judgment for 93*l.* on her counterclaim.

The Divisional Court, considering itself bound by the decision of a former Divisional Court in *Dufty* v. *Palmer* (1), where it was held that where premises have been let at a rent lower than the standard rent, a landlord cannot, by terminating the tenancy and giving notice of increase, raise the rent to the standard rent, dismissed the appeal, but gave leave to appeal.

The plaintiff appealed.

Derbyshire K.C. and *Fortune* for the appellant. First, the evidence before the Official Referee was clear to establish that the notice of increase had been duly served on the respondent. Secondly, the form of notice was substantially in the form required by the statute and was therefore a good notice. Thirdly, the decision in *Dufty* v. *Palmer* (1), which the Divisional Court felt constrained to follow, was wrong and should be overruled. It certainly went beyond what was intended by the Act. The point was considered by McCardie J. in *Glossop* v. *Ashley* (2) and he said (3): " Now the Acts appear to assume that although a landlord cannot raise the rent of a house above the standard rent, plus the permitted increases, yet he may at any time raise to a standard rent a rent which previously had been below the standard rent. There is nothing, so far as I can see, to prohibit such a course provided that due notice to determine a tenancy is given. Save as forbidden by the Act the ordinary powers of a landlord appear to remain." In that case in the Court of Appeal (1), Bankes L.J. expressed no opinion upon this point, Scrutton L.J., as reported in the Law Journal report, took the same view as McCardie J., while Atkin L.J. said he was not prepared to assent to the proposition that a landlord has the right to increase the rent up to the standard rent. It is submitted that the view taken by McCardie J. and Scrutton L.J. is right and should be followed.

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(1) [1924] 2 K. B. 35.

(2) [1921] 2 K. B. 451.

(3) Ibid. 458.

Linton Thorp K.C. and *Alban Gordon* for the respondent. First, the Official Referee was entitled to find on the evidence given before him that no notice had been served on the respondent. Secondly, even assuming that it was served it was not a valid notice. Sect. 15 of the Increase of Rent, &c., Act, 1920, says that " a tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act," and there are no provisions of the Act enabling a landlord to do what the appellant purported to do. Thirdly, the decision in *Dufty* v. *Palmer* (2) was correctly decided and should be followed. The mere fact that a tenant remains in possession of a dwelling-house does not involve an acceptance by him of any terms which the landlord may seek to impose upon him ; the tenant remains in because the landlord cannot get him out. It is submitted that the view indicated by Atkin L.J. in *Glossop* v. *Ashley* (3) was right, that a landlord has no right to increase the rent of an existing tenancy up to the standard rent.

Derbyshire K.C. replied.

SCRUTTON L.J. This action was brought by the landlord of a house against the tenant, Mrs. Copping. The house has always been within the Rent Restriction Acts. In February, 1932, the plaintiff issued a writ against the defendant

(1) [1922] 1 K. B. 1; 90 L. J. (K. B.) 1237.

(2) [1924] 2 K. B. 35.

(3) [1922] 1 K. B. 1, 11.

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claiming 278*l*. 15*s*., of which 142*l*. 15*s*. represented rent at 22*l*. 15*s*. per quarter, and 136*l*. represented a sum due on a bill of sale with interest. Application was made for judgment under Ord. XIV., but on an affidavit made by the defendant that she had a defence to the claim and had a counterclaim in respect of overpayments, leave to defend was given and the matter was referred to an Official Referee. The ordinary course would then be for pleadings to be ordered, but none were ordered, and the action went to trial without them, an extremely unsatisfactory way of dealing with a case of this complication. What the plaintiff alleged appeared from the writ; what the defendant was alleging did not appear, and the trial proceeded on points mentioned from time to time without any consideration of figures. The defendant contended that 55*l*. was the standard rent, but the Official Referee rightly decided that the standard rent was 65*l*. The tenancy began in September, 1916, under an agreement for three years at 47*l*. 10*s*., with an option for another three years at 55*l*. On July 13, 1922, the plaintiff said he served a notice of increase of rent, the effect of which is one of the matters in dispute. The defendants denied that the notice was in fact served and the Official Referee has found that service of it had not been proved, but I am quite unable to agree with that conclusion. The notice intimated that the standard rent would be 65*l*. plus 15 per cent. and 25 per cent. permitted under s. 2 of the Increase of Rent Act, 1920; it was in the statutory form, but instead of saying "I intend to increase the rent by so much," it said "I intend to increase the standard rent of 65*l*."; it then claimed the increases allowed by the statute, which being calculated on the standard rent brought the total rent up to 91*l*. I am of opinion that that was a good notice.

The point is taken on behalf of the tenant that the landlord, who had let the house at less than the standard rent, could not increase the rent to the standard rent, and for this reliance was placed on *Dufty* v. *Palmer*. (1) In the present case the members of the Divisional Court quite properly felt themselves bound by the decision in *Dufty* v. *Palmer* (1) given by a Court of co-ordinate authority. In giving judgment the Master of the Rolls said that as the case was going further, he would say nothing about *Dufty* v. *Palmer* (1), but Romer L.J. expressed the hope that the correctness of the decision in *Dufty* v. *Palmer* (1) would be reconsidered by a superior Court. The earlier case of *Glossop* v. *Ashley* (2) had reference to a tied house in respect of which two rents were being paid—130*l.* by the brewers and 24*l.* by the tenant. The puzzle was which was the standard rent. The point whether the rent could be increased to the standard rent was not directly raised. McCardie J. and all the members of the Court of Appeal held that the standard rent was that paid by the ultimate tenant—namely, 24*l.*; but incidentally two members of the Court of Appeal, although it was unnecessary for them to do so, considered the question whether, if, after 1914, where the rent is less than the standard rent, the landlord can increase the rent to the standard rent. McCardie J. thought the landlord could, and I took the same view. Atkin L.J. took the opposite view, while Bankes L.J. said he would decide the point when it arose. When the point came before the Divisional Court in *Dufty* v. *Palmer* (1) the judges—Horridge and Sankey JJ.—being confronted with *Glossop* v. *Ashley* (2), came to the conclusion, which looks rather odd in the result, first, that a landlord cannot increase a rent which is below the standard rent to the standard rent under the Act, and secondly, that the increases permitted by the Act are not to be based on the rent actually being paid but on the standard rent. As I have said, the Divisional Court in the present case considered itself bound by the decision in *Dufty* v. *Palmer* (1); we are not, and in deciding whether it is right or not we must go to the statute, in which I can find nothing prohibiting the raising of the rent of a house up to the level of the standard rent. The Act was passed during the war at a time when increases of rent were being made, sometimes to an enormous extent over the rents which were being paid before the war, and the object of the Act was to prevent increases beyond the pre-war rent except

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(1) [1924] 2 K. B. 35.

(1) [1924] 2 K. B. 35. (2) [1922] 1 K. B. 1.

as provided by the Act. To raise the rent from a figure below the standard rent to the standard rent is not to increase the rent payable before the war; it is keeping it at the pre-war level. It cannot be supposed that Parliament intended to prevent a landlord recovering the sum which he had been recovering before the war and which was fixed by the Act as the standard rent. Sect. 1 of the Increase of Rent Act, 1920, is almost identical with s. 1 of the Act of 1915, and all that it provides is that where the rent of a house to which the Act applies is increased, then, if the increased rent exceeds by more than the amount permitted under the Act—the standard rent—such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. To raise the rent to the standard rent merely carries out the idea of the Act that the tenant of a house to which the Act applies should not, after the war, pay more than the rent he was paying before the war, that is the standard rent, except such increases as are specifically permitted by the Act. I come to the same conclusion as I came to in *Glossop* v. *Ashley* (1), that there is nothing in the Act prohibiting a landlord making changes in the rent which only result in his being able to recover the standard rent. Consequently I think that *Dufty* v. *Palmer* (2) was wrongly decided, and as the Divisional Court in the present case based its decision upon it the judgment on that point cannot stand.

With regard to the defendant's counterclaim for overpayments of rent, the Rent Restrictions Act, 1923, s. 8, sub-s. 2, provides that " any sum paid by a tenant . . . . which under subsection (1) of section fourteen of the principal Act is recoverable by the tenant. . . . shall be recoverable at any time within six months from the date of payment but not afterwards. . . . ." That provision was not called to the attention of the Official Referee, and it is said that the point cannot now be taken. There is a well-known statutory provision that a policy of marine insurance p.p.i. is void. It is also a well-known business rule that no underwriter shall take the

(1) [1922] 1 K. B. 1; 90 L. J. (K. B.) 1237.

(2) [1924] 2 K. B. 35.

objection that a policy sued on is p.p.i. The question, however, arose as to the duty of the Court when it appeared that a policy under consideration was p.p.i. and neither of the litigants took the point. Several judges who took the Commercial List said that it was the duty of the Court to take the point if it was clear that the policy was p.p.i. A curious and practical difficulty sometimes arose. A policy was handed up to the judge and it was seen to contain pinholes. The Court might strongly suspect that the p.p.i. slip had been attached by a pin and had been taken off ; but there being no evidence of this the Court was unable to act upon the supposition. But it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it. The judgment on the counterclaim for alleged overpayments cannot stand. The appeal will be allowed and judgment entered for the plaintiff on the claim and counterclaim.

GREER L.J. The facts relevant to the decision of this case have been fully stated, but as we have come to the conclusion that *Dufty* v. *Palmer* (1) was wrongly decided, I think it necessary to add a few words.

The action resolved itself into a claim for balance of rent at the rate of 91*l*. per annum. When the order referring the trial to the Official Referee was made there was no counterclaim, but there was a statement in an affidavit that a counterclaim might be put forward, and without objection by the plaintiff the Official Referee concerned himself with the question whether there had been overpayments which the defendant was entitled to recover. Unfortunately, the statutory provision contained in s. 8 of the Rent Restrictions Act, 1923, that only six months' overpayments could be recovered, was not brought to the notice of the Official Referee and he gave judgment for the defendant on the counterclaim for 93*l*. on the footing that he was entitled to go back to September, 1922. In my judgment it was unnecessary for the Official Referee to consider the counterclaim at all because I am satisfied that 91*l.* was the proper rent of this house after the termination of the second agreement in 1922. The standard rent was 65*l.* and the statutes contain nothing to deprive the landlord of his right to raise the rent to the standard rent and then add the permitted increases. Sect. 1 of the Act of 1920 recognizes this, and in the present case the standard rent of 65*l.* with the permitted increases came to 91*l.* That view of s. 1 is, I agree, inconsistent with the decision in *Dufty* v. *Palmer* (1), by which the Master of the Rolls and Romer L.J. sitting as a Divisional Court in this case held themselves bound. The question in *Dufty* v. *Palmer* (1) was approached from the point of view whether power was given in the Act to raise the rent, whereas the question was whether there was any restriction imposed by the Act against the rent being raised. Notwithstanding the fact that that decision has stood since 1924 I think it right to take the view that it was wrongly decided, and that therefore we must refuse to follow it. Reference was made to the decision of McCardie J. in the earlier case of *Glossop* v. *Ashley* (2) where he said: "If therefore a landlord after due notice of claim and after the expiration of the common law tenancy demands the standard rent from the statutory tenant, then I think that the tenant must be held liable in law to the higher rent. I see no other way of reconciling the statutory provisions with common law obligations." When that case went to the Court of Appeal (3) Scrutton L.J. agreed with that view. I too agree entirely with it for the reasons given.

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(1) [1924] 2 K. B. 35.

On the other points that have been argued I am satisfied that the notice given by the landlord was duly served, that it was substantially in the form required by the Act, and that it was a good notice. An argument was based on s. 15 of the Act of 1920 suggesting that the tenant was entitled to retain possession of the house at the rent which she had been paying. The section has not that effect. I think it was meant to preserve the terms of the existing lease subject to the provisions of the Act as to the rent, and restricting ejectment. I agree that the counterclaim could not succeed in view of the limitations of the Act, and I agree that this appeal should be allowed.

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(1) [1924] 2 K. B. 35.
(2) [1921] 2 K. B. 451, 458.
(3) [1922] 1 K. B. 1.

MAUGHAM L.J. I agree, and I only desire to add a few words on the one point on which there has been a difference of judicial opinion, namely, the question which was raised and decided in *Dufty* v. *Palmer*. (1) Sect. 1 of the Increase of Rent, &c., Act, 1920, restricts any increase of rent beyond the standard rent except as to increases which the Act specifically permits, and it says that the amount of any unauthorized increase shall be irrecoverable from the tenant. The section says nothing about the rent actually payable, and it contains nothing to suggest that the landlord may not increase that rent up to the standard rent. Sect. 2 deals with permitted increases, and there again there is nothing to suggest that the increases are limited to increases by reference to the rent actually payable at the date of the notice. Since the permitted increases are additions to the standard rent there is nothing to show that the common law right of the landlord to terminate an existing tenancy and to fix the rent for the new tenancy at the standard rent is taken away. Sect. 3 limits the permitted increases. Sub-s. 1, which says that " nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession," gave rise to considerable differences of judicial opinion, and when the question was ultimately dealt with in the House of Lords in *Kerr* v. *Bryde* (2) Lord Dunedin and Lord Wrenbury took one view and Lord Atkinson, Lord Sumner and Lord Carson took a different view. The decision of the majority was that the sub-section imposed a condition precedent on the right of a landlord to make a permitted increase, the condition, namely, that he had terminated the tenancy by notice. That sub-section, however, does not touch the present question as the increases mentioned in sub-s. 1 must be those referred to and limited by s. 2. Sub-s. 2 of s. 3 requires a notice of

(1) [1924] 2 K. B. 35.

(2) [1923] A. C. 16.

a particular kind to be served notwithstanding any agreement to the contrary where the rent of the house to which the Act applies is increased. To my mind sub-s. 2 is dealing only with increases permitted by the Act in s. 2, this view being borne out by the form contained in the schedule, which is inapplicable to a case where all that the landlord is doing is to say, " I am increasing your rent as from the expiration of your tenancy by effluxion of time, to the standard rent, that not being an increase prohibited by s. 1." In this case a notice was necessary and it had to comply with the Act. A question was raised as to its form, but I think it substantially complied with the schedule and was therefore a good notice. The next material question to be considered is s. 5 of the original Act, now substantially altered by later legislation. Sect. 5 as it existed imposed certain restrictions upon landlords who desired to obtain orders or judgments for the recovery of houses to which the Act applied. That section was general in its terms, but it had nothing to do with the more limited question of increase of rent. Even though a tenant has been refusing to pay the rent lawfully due, quite apart from any question of increase, and even though breaches of covenant had been committed, s. 6 imposed a restriction on the right of distress for rent—namely, the obtaining of the leave of the county court. That again has nothing to do with the question of increase of the rent. Sect. 11 requires the landlord, at the request in writing of the tenant, to supply in writing a statement of the standard rent. Then comes s. 15 as to the effect of which different opinions have been expressed. The section created a statutory tenancy and defends the possession of the statutory tenants, saying that he shall " so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act." What does that mean ? To my mind the phrase is not so framed as to extend to the case of the payment of rent. It is not dealing with rent. The tenant is to observe and to be entitled to the benefit of certain terms and conditions. It does not say that he will observe the covenant to pay the rent, and the words are not apt to describe the events which have happened since the Act came into force, for example, an increase of rent permitted by s. 2, nor does it say anything about the landlord's right to recover rent. However that may be, and whatever may be the solution of the doubtful questions as to the original tenancy which are to apply by virtue of that section to the statutory tenancy, the argument based upon the first three sections of the Act is unaffected by it. They cannot mean that a tenant is entitled to hold the premises at a rent lower than the standard rent. If that had been intended it would have been easy to express it in clear terms, and I think ss. 1, 2 and 3 indicate the contrary. In my opinion this right of a landlord on the expiration of a legal tenancy to raise the rent to the standard rate was his right at common law and it has not been interfered with by the Act. Accordingly I agree that *Dufty* v. *Palmer* (1) was wrongly decided, and that this appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Payne & Co.*
Solicitors for respondent: *Thorp, Saunders & Thorp.*

J. S. H.

(1) [1924] 2 K. B. 35.

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In re SIR WILLIAM THOMAS PAULIN.

In re PERCY CROSSMAN.

Revenue — Estate Duty — Company — Ordinary shares — Restriction on alienation—Price fixed by Articles—Death of Shareholder—Value of shares for purpose of estate duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1 ; *s.* 7, *sub-s.* 5.

The Finance Act, 1894, s. 7, sub-s. 5, provides: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

By art. 34 of the articles of association of a company any holder of ordinary shares of the company took and held them subject to restrictions and conditions which permitted a male holder to transfer or bequeath them to any of his sons or daughters or grandsons, being sons of sons, or brothers or nephews, being sons of brothers, and being of the age of twenty-five years at the least and approved as a transferee by the directors. Otherwise the proposing transferor, whether the holder or his personal representatives, was required to give notice in writing to the company, with the consequence that the shares were offered to other members of the company holding ordinary shares, and then the price (hereinafter called "the articles price") was ascertained in a specified manner. It was only if the company could not within three months of the notice find a member willing to buy the shares that they could during the following three months be sold free of restriction. At all material times the articles price was far below the value of the shares free from all restrictions, and it was found that the possibility of the company failing to find a purchaser could be disregarded :—

Held, by the Court of Appeal (Slesser and Romer L.JJ., Lord Hanworth M.R. dissenting) that every ordinary share of the company must be regarded as containing as a necessary incident the obligation (when it was being sold) to offer it through the agency of the company to the shareholders at the articles price. The hypothetical sale in the open market required by s. 7, sub-s. 5, of the Finance Act, 1894, for the purpose of estimating the principal value of shares on the death of a shareholder did not justify the fixing of a price without reference to that necessary incident. The articles price as at the date of the death of the male shareholder must therefore be taken as the value of the shares for the purpose of estate duty.

Decision of Finlay J. reversed.

Attorney-General of Ireland v. *Jameson* [1905] 2 I. R. 218 and *Salvesen's Trustees* v. *Inland Revenue Commissioners* (1930) Sc. L. T. 387 not followed.

APPEALS from Finlay J.

The matter came before Finlay J. on two petitions by way of appeal under s. 10 of the Finance Act, 1894, by the executors of Sir William Thomas Paulin and of Percy Crossman against the decisions of the Commissioners of Inland Revenue to the effect that the principal value for the purposes of the estate duty payable on their respective deaths in respect of 1600 ordinary shares of 100*l.* each held by Sir William Thomas Paulin at his death and 1000 ordinary shares of 100*l.* each held by Percy Crossman at his death in Mann, Crossman & Paulin, Ld. (hereinafter called "the company"), was 475*l.* per share as compared with the values of 221*l.* 4*s.* 5*d.* per share and 209*l.* 13*s.* 8*d.* per share placed upon them by the executors of Sir W. T. Paulin and Percy Crossman respectively.

The facts in regard to the appeal by Sir W. T. Paulin's executors as stated in their petition were as follows: Sir W. T. Paulin (hereinafter referred to as "the deceased") died on February 26, 1931, and his will with seven codicils thereto was on June 6, 1931, proved in the Principal Probate Registry by the petitioners.

The deceased was at the time of his death the holder of 1600 ordinary shares of 100*l.* each in the company, which carried on the business of brewers at the Albion Brewery, Whitechapel Road, London.

The company was incorporated on October 10, 1901, under the Companies Acts, 1862 to 1900, as a company limited by shares, and its nominal capital was at all material times 2,250,000*l.* divided into 10,000 ordinary shares of 100*l.* each and 125,000 5 per cent. cumulative preference shares of 10*l.* each, all such shares (both ordinary and preference) being issued and paid up or credited as paid up in full. Art. 34 of the articles of association of the company contained special provisions as to its ordinary shares, and art. 34 (in the form in force at the death of the deceased and still in force) included provisions in the following terms:—

"34. Every holder of ordinary shares shall take and hold the same subject to the following provisions:—

(1.) A male holder may at any time transfer any one or

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more of his said ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and being of the age of 25 years at the least and being in other respects in the opinion of the directors duly qualified for membership.

(2.) A male holder may by his will or any codicil thereto appoint any one or more of his ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and being at the time of his death of the age of 25 years at the least; and any such appointee shall be entitled to a transfer of the shares from the legal personal representatives of the appointor, provided that the directors within three months after the death of the appointor signify their approval of the transferee.

(3.) A male holder may by his will or any codicil thereto appoint any one or more of his ordinary shares to any of his sons daughters or grandsons (being sons of sons) or brothers or nephews (being sons of brothers) and who may at the time of his death be under the age of 25 years on the footing that the appointment is only to take effect as and when the appointee attains the age of 25 years, and may in like manner make provision as to the application of the interim income arising from such shares for the benefit of the appointor's widow (if any) and any child or children or remoter issue or brother or nephew (being a son of a brother) of the appointor or some or one of them. And in default of and subject to any such provision such interim income shall be applied in such manner as the legal personal representatives of the appointor shall think fit for the benefit of any such persons as aforesaid. Any such appointee shall on attaining the age of 25 years be entitled to a transfer of the shares from the legal personal representatives of the appointor, provided that the directors within three months after he becomes so entitled signify their approval of him as transferee.

(3A.) The ordinary shares held by any person who shall have acquired his holding under sub-clauses (1.), (2.) or (3.) of this clause and

(*a*) who has no issue, or

(*b*) who dies without having disposed of his ordinary shares pursuant to sub-clauses (2.) or (3.) hereof,

may, and in the case of the death of such holder without having disposed thereof shall, be offered to the company pursuant to sub-clauses (6.) to (14.) (*c*) hereof inclusive or such of the same sub-clauses as may be applicable. Provided always that in the case of ordinary shares held by any person, who shall have acquired his holding under sub-clauses (1.), (2.) or (3.) of this clause and who is a daughter of any ordinary shareholder such ordinary shares shall be transferable only pursuant to the provisions contained in the said sub-clauses (6.) to (14.) (*c*) or such of them as may be applicable.

(6.) Except where the transfer is made pursuant to paras. 1, 2, 3 or 5 of this clause, a member proposing to transfer any ordinary share (hereinafter called 'the proposing transferor') shall give notice in writing (hereinafter called 'the transfer notice') to the company that he desires to transfer the same. Such notice shall constitute the company his agent for the sale of the share at par value to any member of the company holding an ordinary share or ordinary shares.

(7.) The transfer notice may include several ordinary shares, and in such case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.

(8.) If the company shall, within the space of three months after being served with such notice, find a member holding an ordinary share or ordinary shares willing to purchase the share (hereinafter called 'the purchasing member') and shall give notice thereof to the proposing transferor, he shall be bound upon payment of the par value, to transfer the share to the purchasing member.

(9.) In these regulations the par value of any share means a sum equal to the capital paid up thereon.

(12.) If the company shall not, within the space of three months after being served with the transfer notice, find a member holding an ordinary share or ordinary shares willing to purchase the shares and give notice in manner aforesaid, the proposing transferor shall, at any time within three

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calendar months afterwards, be at liberty (subject to para. 14 hereof) to sell and transfer the shares (or those not placed) to any person and at any price.

(14.) Subject to paras. (2.) and (3.) of this clause the legal personal representatives of a deceased holder of an ordinary share or ordinary shares shall within three calendar months after the death of such holder, serve the company with a transfer notice in respect of the ordinary shares of the deceased, and if default is made in serving such notice within the time aforesaid, the directors shall be at liberty to appoint any person to sign and serve such notice on behalf of the legal personal representatives of the deceased and a transfer notice signed and served by such person shall be effective.

(14A.) Provided nevertheless that when under any of the paras. (6.), (7.) and (14.) of this clause a transfer notice by or on behalf of any member or legal personal representatives of a member is given to the company as aforesaid in regard to any ordinary share or shares, the purchase money for such ordinary share or shares or for such of them as shall be purchased under this clause shall, in addition to the par value thereof, be

(*a*) a sum bearing the same ratio to the amount of the company's reserve fund at the date of the giving of the transfer notice as the number of shares purchased as aforesaid bears to the whole number of the then issued ordinary shares and

(*b*) a sum bearing the same ratio to the full amount of the profits of that portion of the financial year current at the date of the giving of the transfer notice which shall have elapsed at the date of the giving of such notice as the number of the ordinary shares purchased as aforesaid shall bear to the full amount of the issued ordinary shares and

(*c*) a sum bearing the same ratio to the full amount or value of any other undivided or unapplied profits of any preceding financial year or years (whether or not such profits shall have been carried forward) as the number of the ordinary shares purchased as aforesaid bears to the full amount of the issued ordinary shares and it shall be sufficient in such notice to specify the amount of the purchase money per share by stating it to be a sum to be fixed in accordance with this clause (No. 34).

The certificate of the auditor of the company as to the amount of the purchase money per ordinary share which in his opinion is payable in any particular case where this clause (No. 34) applies, shall be conclusive as to the amount in that case payable.

The reserve fund named and referred to in sub-para. (*a*) of this clause is hereby declared to be the General Reserve only (standing on the books of the company on 25th July 1907 at 110,000*l.*) less the sum of 34,467*l.* 7*s.* on the same date forming part thereof.

(15.) The directors may refuse to register any transfer of a share (A) when the company has a lien on the share; (B) when, in the case of shares not fully paid, it is not proved to their satisfaction that the proposed transferee is a responsible person; (C) when the directors are of an opinion that the proposed transferee is not a desirable person to admit to membership, and that without being bound to assign any reason for such opinion. But paras. (B) and (C) of this clause shall not apply when the proposed transferee is already a member holding more than 250 ordinary shares."

At the death of the deceased the price of an ordinary share of the company ascertained in accordance with the provisions of sub-para. (14A.) of art. 34 was 209*l.* 13*s.* 8*d.*, and in the Inland Revenue affidavit leading to probate of the said will and codicils his executors valued his 1600 ordinary shares at 209*l.* 13*s.* 8*d.* per share accordingly and paid estate duty on that basis.

By his will the deceased (in pursuance of the limited power of testamentary disposition conferred by sub-para. (2.) of art. 34) specifically disposed 500 of his ordinary shares to each of his two daughters and the transfer of these shares was duly made by the executors.

The remaining 600 of the ordinary shares of the deceased formed part of his residuary estate, and on May 14, 1931, the executors (as they were bound to do) served a transfer notice in respect thereof on the company. Pursuant to such transfer notice the company in due course found purchasing members for these 600 ordinary shares, and the executors duly sold and transferred the same to such purchasing members accordingly. The price per share for the purpose of such sale ascertained in accordance with sub-para. (14A.) of art. 34 was 219*l.* 16*s.* 7*d.*, the increase in comparison with the price per share as at the death of the deceased being due to the fact that a larger proportion of the company's accruing profits for its financial year ending on September 30, 1931, fell to be included in the calculation required to be made under sub-para. (14A.). The total gross purchase consideration receivable by the executors for the 600 ordinary shares was accordingly 131,897*l.* 10*s.*, but after adjustment in respect of monthly instalments on account of the accruing dividend on such shares received by the deceased in his lifetime and by the executors after his death the net purchase consideration received by the executors amounted to 129,897*l.* 10*s.* only, or 216*l.* 9*s.* 11*d.* per share.

The Inland Revenue Commissioners declined to accept the probate valuation of 209*l.* 13*s.* 8*d.* per share, and they ultimately notified the executors by letter dated January 6, 1933, of their decision to the effect that the value of the 1600 ordinary shares for the purposes of the estate duty payable on the death of the deceased was 475*l.* per share.

The executors being aggrieved by this decision and desirous of appealing delivered to the Inland Revenue Commissioners a written statement of the grounds of appeal on February 9, 1933, the time for delivery having been extended by consent.

By letter dated February 17, 1933, the Commissioners notified the executors of their determination to maintain their decision.

The deceased's executors submitted that this decision was erroneous as failing to make any allowance (or any adequate allowance) for the provisions of art. 34; and that having regard to the terms of the article the principal value of the said ordinary shares for the purposes of the estate duty payable on the death of the deceased did not exceed the price per share as at the death of the deceased ascertained in accordance with sub-para. (14A.) of the article, that is, 209*l.* 13*s.* 8*d.* per share; and that in the premises the sum of 209*l.* 13*s.* 8*d.* per share was the value which should be put on these ordinary shares for the purposes of such estate duty.

Further or in the alternative they contended with regard to the 600 shares purchased by other members of the company pursuant to the provisions in that behalf contained in art. 34, that the property which passed on the death of the deceased within the meaning of the Finance Act, 1894, was not the shares themselves but the price payable for the same upon a purchase thereof under the aforesaid provisions ascertained in accordance with sub-para. (14A) as at the date of such death; that is to say, the said sum of 209*l.* 13*s.* 8*d.* per share.

Further or in the alternative they contended that the sum of 209*l.* 13*s.* 8*d.* per share was the value which should be put on the deceased's ordinary shares for the purposes aforesaid having regard to the financial position and trading and dividend earning prospects of the company at the death of the deceased.

They therefore claimed to have the decision of the Inland Revenue Commissioners set aside and that in lieu thereof it might be declared that the principal value of the said ordinary shares for the purposes of the estate duty payable on the death of the deceased (or alternatively the property passing on such death as regards the 600 shares not specifically bequeathed by him) was the sum of 209*l.* 13*s.* 8*d.* per share.

The facts as set out in the petition of the executors of Percy Crossman differed from the facts set out above in the following respects:

Percy Crossman died on August 17, 1929, possessed of 1000 ordinary shares of 100*l.* each of the company. At his death the price of an ordinary share of the company ascertained in accordance with the provisions of sub-para. (14A.) of art. 34 was 221*l.* 4*s.* 5*d.*, and estate duty was paid on that basis. By his will Percy Crossman (in pursuance of the limited powers of testamentary disposition conferred by art. 34) specifically disposed of all his ordinary shares. In this case also the Inland Revenue Commissioners fixed the value of the 1000 ordinary shares for the purposes of the estate duty payable at the death of deceased as 475*l.* The contentions advanced by these executors were the same as those in the preceding petition except that the special contention as to 600 shares in the first petition did not arise in this case. These executors claimed that the decision of the Inland Revenue Commissioners should be set aside, and that in lieu thereof it might be declared that the principal value of the said ordinary shares for the purposes of the estate duty payable on the death of Percy Crossman was the sum of 221*l.* 4*s.* 5*d.* per share.

Evidence was given before Finlay J. as to the value of an ordinary share ascertained by reference to the price to be paid by a shareholder under art. 34, and there was no dispute that as at the death of the deceased the value was 209*l.* 13*s.* 8*d.* and as at the death of Percy Crossman 221*l.* 4*s.* 5*d.* Evidence was also given in regard to the value of an ordinary share estimated at the amount which it would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered as holder of the share but should take and hold it subject to the provisions of the articles of association, including art. 34; and of the additional value in such a case if a trust company was treated as a possible purchaser.

Finlay J. said that the first and main question which arose was what was the correct principle of valuation to be adopted. As far as he was concerned he had already intimated that the matter as one of principle was concluded by the decision of the Irish Court of Appeal in *Attorney-General of Ireland* v. *Jameson.* (1) That was a case of high authority, and the principle there laid down was stated in the judgment of Holmes L.J., when he said: " I would prefer a declaration that the principal value of the shares is to be estimated at the price which, in the opinion of the Commissioners, they would fetch if sold in the open market, on the terms that the purchaser should be entitled to be registered as the holder of the shares, and should take and hold them subject to the provisions of the articles of association, including the articles relating to alienation and transfer of the shares of the company." In *Salvesen's Trustees* v. *Inland Revenue Commissioners* (1) Lord Fleming expressed his approval of that decision and adopted and followed it. While cases in Ireland and Scotland were not technically binding on the Court, there was a practice that in revenue matters, when the law was the same, the decisions of the Irish and Scottish Courts should be followed. He proposed to follow that practice.

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(1) [1904] 2 I. R. 644; [1905] 2 I. R. 218.

It was not easy to apply the principle, and a difficulty arose in these cases which illustrated the sort of difficulties which must arise. It appeared on the evidence that a trust company was likely to be the highest bidder for shares of this sort, but the evidence of Sir Edward Mann satisfied him that at the material dates the directors would not have registered a trust company. The question was whether in these circumstances the notional theory of an open market required that a trust company should be included. With hesitation he had come to the view that the theory of the open market could not mean that every person in the world had notionally got to be considered as in the market; and he was satisfied upon the evidence that from a business point of view a trust company would not, and could not, have been in the market, because the directors with whom the discretion lay would have refused to register a trust company, and a trust company when considering a purchase could and would have ascertained that. He thought therefore that trust companies ought to be excluded from consideration.

His Lordship then dealt with the evidence, and arrived at the conclusion that the value of a share on the principle laid down in *Attorney-General of Ireland* v. *Jameson* (2) was at the death of the deceased 355*l.* and at the death of Percy Crossman 351*l.*; and that if, contrary to his view, a trust company was to be treated as in the market these amounts

(1) (1930) Sc. L. T. 387.

(2) [1905] 2 I. R. 218.

would each be increased by 40*l.* He therefore fixed the values at 355*l.* and 351*l.* respectively.

Both sets of petitioners appealed, and there was in each case a cross-appeal by the Crown. The appeals and cross-appeals were heard on July 4 and 5 and judgment given on July 27, 1934.

On the appeals and cross-appeals the values fixed by Finlay J. were not questioned, and the only question was what principle ought to be applied for the purpose of computing the value of a share on the death of a shareholder.

Wilfrid Greene K.C. and *D. Ll. Jenkins* for the appellants. Under s. 1 of the Finance Act, 1894, estate duty is levied on the principal value of property passing on the death of a person, and by s. 7, sub-s. 5, the principal value is to be estimated to be the price which, in the opinion of the Commissioners, the property would fetch if sold in the open market at the time of the death, a right of appeal being given by s. 10. Finlay J. has felt bound to apply the principle laid down in *Attorney-General of Ireland* v. *Jameson* (1) for the purpose of valuing the shares of the deceased and of Mr. Percy Crossman, but it is contended that that case was not rightly decided by the Court of Appeal in Ireland. The shares in question in this case are subject to a restriction on sale which prevents the respective executors from obtaining the full price which the shares would realize if free of that restriction. The Court of Appeal in *Jameson's* case (1) were led by s. 7, sub-s. 5, of the Act to hold that the value must be taken to be the amount that would be given in the open market for the shares on the assumption that the purchaser would be registered as a shareholder but would then hold them subject to the restriction on alienation applicable in that case. This ignores the decision of Farwell J. in *Borland's Trustee* v. *Steel Brothers & Co.* (2) that a share is an interest measured by a sum of money and made up of various rights contained in the articles of association. It is therefore an inherent part of the shares in this case that they are subject to the restriction on alienation contained in the articles, and that is not an agreement collateral to the shares. What has to be determined is the value of a share at the death of the shareholder. If the executors had sold, all the purchaser would have obtained is a right to the purchase price paid by a shareholder under art. 34 if a member of the family exercised the right to buy and the share itself if that right was not exercised. Finlay J. has held in this case that a member of the family would certainly buy, so that the alternative can be excluded. In the present case therefore the purchaser would receive 209*l*. 13*s*. 8*d*. or 221*l*. 4*s*. 5*d*., as the case might be, and that is obviously all that the purchaser would be prepared to pay for the share and must be the value of the share in the open market. In *Jameson's* case (1) the Court of Appeal, while accepting the decision in *Borland's* case (2), treated the executors as selling something they had no right to sell. It was wrong to say that the shares were not capable of sale in the open market while remaining subject to the restriction on alienation, as already pointed out. The effect of the restriction will be that the purchaser has bought either the share or the price the member of the family pays for it. The decision in *Jameson's* case (1) was followed in the Irish Free State in *Smyth* v. *Revenue Commissioners* (3) and in Scotland in *Salvesen's Trustees* v. *Inland Revenue Commissioners*. (4) They all go wrong in not recognizing that the value in the open market is to be put upon a share subject to a restriction on alienation, and that there is no justification for treating it as a share not subject to that restriction. This Court is in no way obliged to follow these decisions of Irish and Scotch Courts: see Dowell on Income Tax, 9th ed., p. 238. No doubt the decision in *Jameson's* case (1) has stood uncontradicted for twenty years, but that is not really conclusive: see per Sir George Jessel in *Ex parte Willey*. (5) Further, it is suggested that the principle of accepting a decision when there is antiquity of decision does not apply to taxing cases. Each subject is entitled to have his liability to tax considered afresh.

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(1) [1904] 2 I. R. 644; [1905] 2 I. R. 218.

(2) [1901] 1 Ch. 279, 288.

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(1) [1905] 2 I. R. 218.
(2) [1901] 1 Ch. 279.
(3) [1931] I. R. 643.
(4) (1930) Sc. L. T. 387.
(5) (1883) 23 Ch. D. 118, 127.

Sir Donald Somervell S.-G. and *J. H. Stamp* (*Sir Thomas Inskip A.-G.* with them) for the Crown. It is not suggested that the Court is bound by the existence or antiquity of *Jameson's* case (1), but the argument to the contrary of that and other decisions is based on a misconstruction of the articles of association and of the statute. During the life of a shareholder there was nothing in art. 34 to prevent his obtaining a price fixed by competition between the members of the family, and therefore right up to his death the deceased's shares had the value put on them by Finlay J. He therefore held shares worth 355*l.* at his death, and as regards the shares given to his daughters, the daughters must have received shares of that value. In other words that was the value of the shares to any one who could get the shares registered in his name. The special price fixed by art. 34 only applies to the limited extent mentioned in sub-clauses 6, 7 and 8, and even then if the company fails to find a purchaser within three months it ceases by virtue of sub-clause 12 to apply. It is that value that the appellants are seeking to apply in spite of the wide words of the Finance Act, 1894, s. 7, sub-s. 5, fixing the value by reference to the price in the open market, i.e., such a sale as is permitted in special circumstances by sub-clause 12 of art. 34. It has been argued that there could be a sale in the open market subject to the pre-emption right conferred by art. 34, but in such a case the only proper contract would be to purchase the shares if those possessing the pre-emption right did not, and then the purchase price would be that fixed by Finlay J. Further, the words of s. 7, sub-s. 5, must be applied to a case where it was impossible having regard to the restriction on alienation to effect a sale in the open market, in accordance with the reasoning of the Irish and Scotch Courts in *Jameson's* case (1) and *Salvesen's Trustees* v. *Inland Revenue Commissioners* (2). A sale to a restricted class could not be a sale in the open market such as was contemplated in s. 7, sub-s. 5, of the

(1) [1905] 2 I. R. 218.

(2) (1930) Sc. L. T. 387.

Act of 1894: see *Inland Revenue Commissioners* v. *Clay.* (1) *Borland's* case (2) does not assist the appellants. One of the incidences of the shares in this case is that there cannot be a sale in the open market except under sub-clause 12 of art. 34, but as there could be such a sale under sub-clause 12 it must be such a sale that the statute contemplates for the purpose of valuing the shares, and it is the price that would then be realizable which is the value for the purpose of estate duty. The appeal ought therefore to be dismissed.

As regards the cross-appeal, which relates to Finlay J.'s exclusion of a trust company as a possible purchaser; he was influenced by the power conferred by art. 34, sub-clause 15, on the directors to refuse to register a transfer and the evidence that they would refuse to register a trust company. But in ascertaining the price of a share in the open market that cannot be a relevant consideration.

Greene K.C. replied.

Cur. adv. vult.

1934. July 27. LORD HANWORTH M.R. The question to be decided in these two appeals is what is the right value, for the purpose of estate duty, to be placed upon certain shares in the well known brewery company Mann, Crossman & Paulin, Ld.

The proceedings were initiated by petitions by way of appeal from the decision of the Commissioners, presented under s. 10 of the Finance Act, 1894, whereby the appellants, as persons aggrieved by the decision of the Commissioners, seek relief therefrom, and affirm that the value of the shares for the purposes of estate duty is not 475*l.* per share as decided by the Commissioners, but 209*l.* 13*s.* 8*d.* and no more.

The circumstances under which the case arises in the first appeal, shortly put, are that Sir William Thomas Paulin was the holder of 1600 ordinary shares of 100*l.* each in the company. He died on February 26, 1931, and his will was proved by the petitioners, who are the executors named therein. He bequeathed 500 of these shares to each of his two daughters, and the remaining 600 shares form part of his residuary estate.

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(1) [1914] 3 K. B. 466, 478, 479.

(2) [1901] 1 Ch. 279.

We have been told that the question of the amount of the legacy duty to be paid by the daughters, stands over until after a final decision has been given in these proceedings.

The articles of the company contain special provisions as to ordinary shares; and by art. 34, every holder of them takes and holds them subject to the restrictions and conditions contained in the sub-paragraphs to that article, which may be summarized as follows: By sub-clauses 1, 2 and 3, a male holder of ordinary shares may transfer any one or more of them to any of his sons or daughters or grandsons being sons of sons, or brothers, or nephews, being sons of brothers, and being of the age of twenty-five years at the least, and being in other respects in the opinion of the directors duly qualified for membership; and by sub-clauses 2 and 3 he may appoint any of his shares by his will, or a codicil, to the same limited class and subject to the condition stated as to age. Unless the transfer of the shares is made under these sub-clauses, the proposing transferor, whether holder, and testator, or his personal representative, is required by sub-clauses 6 and 14 to give notice in writing to the company, with the consequence that the shares are to be offered to other members of the company, holding ordinary shares, and the price of them is to be ascertained in a particular manner. That price so worked out in the present case amounts to 209*l.* 13*s.* 8*d.*

If no member of the company holding ordinary shares is willing to purchase the shares at this estimated price within a time limit which may amount to six months after the death of the holder, then, and then only, the proposing transferor is to be at liberty to sell and transfer the shares to any person and at any price. The directors under sub-clause 15 have an absolute discretion to refuse to register a transfer to any transferee whom they may consider an undesirable holder of shares.

Finlay J. felt himself bound by the decision of the Court of Appeal in Ireland of the *Attorney-General of Ireland* v.

Jameson (1) and fixed the value of the share at 355*l.*, with the result that he placed the liability of the executors to the Revenue at this reduced figure instead of at 475*l.* and allowed the petition to that extent. He also fixed the value of a share at the higher figure of 395*l.*, if a trust company is to be considered as a possible purchaser. It is argued that such a company has the possibility of a continuity of holding so as to eliminate, for practical purposes, the necessity of a transfer upon death, and that this latter factor which would, or might, act upon the mind of an ordinary transferee, would raise their value to a trustee company bidding for them.

The various values may therefore be tabled as follows :—

(*a*) Value if sold to a holder of ordinary shares in the company under the restrictive articles	£209	13	8
(*b*) Value if sold to an outside purchaser, but not to a trust company . . .	£355	0	0
(*c*) Value if sold to an outside purchaser which might be a trust company . .	£395	0	0

In the case of the petition relating to the shares held by Mr. Percy Crossman deceased, the figures corresponding to the above are slightly different. They are (*a*) 221*l.* 4*s.* 5*d.*, (*b*) 351*l.*, and (*c*) 391*l.* We were told that the result to the appellants of fixing the value at 355*l.* is that the total value of the Paulin shares is lowered by 81,000*l.*, and of the Crossman shares by 33,000*l.* Finlay J. in his discretion allowed no costs on either side, as he considered that the petitioners had not succeeded in reducing the values to what they attempted in their petitions—namely, to the (*a*) values. The appellants appealed to this Court on this question of costs, and affirmed that Finlay J. had not exercised his discretion in accordance with the right principles. We were of opinion that he had exercised his discretion judicially, as he was entitled to do, and we dismissed the appeals on this point.

The main point remains for consideration. What is the right value attaching to these shares ? It is worth while to

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(1) [1905] 2 I. R. 218.

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look at the Act which imposes the estate duty. It is the Finance Act. It was passed "towards raising the necessary supplies to defray your Majesty's public expenses," and s. 1 imposes the duty "upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person." By virtue of this section and the wide terms of interpretation contained in s. 2, and s. 22, the description of the property charged is all embracing; and the words used convey the intention that all property which passes from a deceased person to the hands of another shall contribute its quota to the necessities of the State which has nurtured and preserved it. It is not easy to affirm that some private and exceptional method of confining the possession of certain property to members of a family, or the special devices for ascertaining the amount to be paid by one member of that family to another, or another's estate upon his death, ought to be allowed to depreciate the quota to be paid upon that property, which in the hands of the members of the family provides them with an income and wealth that if measured by the ordinary standards would reach a figure at least half as high again as that which the family estimate of the sum to be paid allows.

The section relevant to the question to be decided in the present case is s. 7, sub-s. 5: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

These words in my judgment clearly connote a notional figure. The value is determined by the opinion of the Commissioners, and is to be ascertained by them in such manner and by such means as they think fit: see sub-s. 8. The time at which it is to be appraised is a time which must have passed when the figure is actually determined. The rule of estimation applies to any estate, including an interest in expectancy, and applies to property passing either immediately on the death or after any interval, either certainly or contingently: see s. 22, sub-s. 1. It is plain that the values of such properties must be reached by estimation and appraisement, not by tables of exact prices. Although since the Act was passed a standard, or measure, may have been attained by experience and applied in normal cases, there must be a number of cases which fall outside the range of such a standard and where opinions may vary widely.

Next the term "open" market imports that there is to be no restriction on the persons who may become buyers—no section of the community is to be excluded. The market is to be the open market as distinguished from an offer to a limited class only such as the members of a family: see per Swinfen Eady L.J., *Inland Revenue Commissioners* v. *Clay*. (1) Equally the prospect of a particular buyer bidding for a property because to him it is, or might be of special value, ought not to be held to provide the estimate of value. The possibility of a special attraction to a particular buyer, or buyers—such as in the present case, a trust company—ought to be taken into account in the manner indicated by Channell J. in the case of the *Bradford-on-Avon Assessment Committee* v. *White* (2), where he says (3): "I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special prices which they may give, owing to personal considerations, and not on account of the value of the premises, should be excluded except so far as the possibility of such special prices being obtained raises the market value generally."

The appellants, accepting that the duty is charged on the value of the property passing, estimated as upon a sale in the open market, contend that that value is to be measured by the amount of money that would be received from a purchaser. They say you must consider what the vendors had to sell—namely, shares in a brewery in respect of which by the terms of the articles you would find members of the family coming forward as purchasers at the restricted price of 209*l*. and no more. Even if the remote possibility of a

(1) [1914] 3 K. B. 466, 475.
(2) [1898] 2 Q. B. 630.
(3) Ibid. 639.

sale under the circumstances contemplated in sub-clause 12 of art. 34 supervened, still after such a sale had been effected, the directors could refuse to register the transfer under sub-clause 15. Further in the present case Finlay J. found as a fact that sub-clause 12 would not come into operation, and therefore the price of 209*l.* would be the effective price at which a share would pass between those available and competent to buy it.

The meaning of a share in a company was explained in *Borland's Trustee* v. *Steel Brothers & Co.* (1) by Farwell J. to be "the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862" (now s. 20 of the Act of 1929). "A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount." If attention is given, therefore, to what is to be sold and to what persons are possible buyers, 209*l.*, and no more must, it is contended, be the true price.

It is answered that the intention of s. 7, sub-s. 5, by using the terms "price which . . . . such property would fetch if sold in the open market," is to disregard any domestic restrictions of the company; and the Commissioners in forming their opinion must assume that all persons are available as purchasers of the share. This view was accepted by Lord Fleming in *Salvesen's Trustees* v. *Inland Revenue Commissioners* (2), but he ultimately took into account to what extent the restrictions in the articles might be expected to depreciate the value of the shares. I am not quite sure that I follow this latter consideration. If it means that a purchaser would take into account that the property he would be buying would have a close and small market, I agree with it, for many properties, otherwise attractive, lose some

(1) [1901] 1 Ch. 279, 288.

(2) (1930) Sc. L. T. 387.

of their value when purchasers consider that they are not readily saleable, or saleable only under certain conditions.

Bearing in mind these considerations and the arguments on either side, I turn to the case of *Attorney-General of Ireland* v. *Jameson* (1), decided in the Court of Appeal in Ireland in 1905. We are told that it has been accepted for many years as laying down the rule to be followed in such cases as the present. In the King's Bench Division of the High Court in Dublin it was held by the majority of the Court—Kenny J. and Boyd J.—that the shares in John Jameson & Son, Ld., which were subject to restrictions on transfer similar to those in the present case, and the price of which was fixed by the ninth of the articles of association at "the fair value of 100*l.*" were not to be valued at that sum under s. 7, sub-s. 5, of the Finance Act, 1894. The declaration made was that in estimating the "principal value" thereunder, regard was to be had to the special provisions in the articles of association with reference to alienation and transfer of the shares of the company and as to "fair value," but that the amount of such principal value was not necessarily limited to the par or "fair value" of 100*l.* a share.

Palles C.B. took a different view and held that the shares were to be valued at what they would fetch, notwithstanding the special provisions contained in the articles of association, and upon the basis that the purchaser should be entitled to be and should be registered as a member of the company in respect of the purchased shares. It will be seen that this latter view disregards the circumstances and conditions attaching to the shares, and ascertains the value at the sum which a purchaser would pay for any share in a sound industrial undertaking which yields so much per annum in dividends to the holder of it. The diversity between the view held by the majority of the Court and Palles C.B. seems based upon the distinction whether the restrictions in the articles are to be treated as integral to and inherent in the nature of a share in the company, or only as matters resting upon collateral agreement and not arising from the nature

(1) [1904] 2 I. R. 644; [1905] 2 I. R. 218.

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of the property itself. Palles C.B. held them to be collateral and, as such, considerations that are immaterial in questions arising on the Finance Act, 1894. The value put upon the shares by the majority in the King's Bench Division seems to involve that the provisions as to alienation and transfer of the shares under the articles are to be taken into account, as a depreciatory condition subsequent.

The Court of Appeal (1) took a course which was not adverse to that of the majority of the Court below, but seems to justify more plainly a higher price being taken than would have followed upon the declaration of the King's Bench Division, for they held that the share was to be treated as if sold in the open market on the terms that the purchaser should be entitled to be registered as holder of the shares, but should take and hold them subject to the articles of association, including the articles relating to the alienation and transfer of the shares of the company. We have not been told—although it would have been interesting—how this direction was translated into figures—what sum per share was ultimately fixed as their value. I have, however, come to the opinion that the decision of the Court of Appeal was right.

I agree for reasons already stated that, as Walker L.J. stated (2), the market indicated by sub-s. 5 is an hypothetical open market. In my opinion the hypothesis supposed also extends and attaches to the property of which the principal value is to be estimated. Upon the facts of this, and the analogous cases, there is no likelihood of a sale of shares of this nature to a stranger, and if the domestic value of the share as fixed by the articles is not to prevail, it seems to me that the possibility or impossibility of the outside purchaser getting upon the register is also to be discarded. The property is to pay its quota to the State for the reasons I have already stated. At the same time, I cannot accept the view of Palles C.B. that the terms of the articles can be set aside as collateral. They determine in my opinion the nature and quality of the property to be sold.

(1) [1905] 2 I. R. 218. (2) [1905] 2 I. R. 235.

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The price at which shares in a sound industrial undertaking will be sold on a stock exchange is not determined by the yield of the dividends alone. Such shares are not treated, as first class gilt-edged securities are treated, as liquid assets, that is to say, saleable at any time, in any quantity, at the current price of money. Attention is paid to the ease with which such a share can be realized upon an emergency; the immediate and prospective supply of such shares available for sale or purchase in the jobber's hands; the number of persons likely to be buyers. All these matters, as the case may be, render the share more or less attractive, and enhance or depreciate its price.

There are other factors which may contribute towards making a share what Kenny J. described as a " dwarfed or stunted thing." In the case of the large gas companies, the dividend is regulated by the price charged to the consumers. A dividend cannot rise beyond a certain sum without the price of gas being reduced, and the prospect of a higher return becomes tantalizingly remote. Such a provision has its effect upon the price that a purchaser will pay for the stock. So here, if the shareholder is to be deemed to be a registered holder, the danger that he may be met, when a transfer of his shares is contemplated, by the term that would require him to accept 209*l.* per share must be taken into account as an adverse feature.

The consideration of the number of persons likely to be buyers leads me to the point raised by the cross-appeals, that trust companies ought to be reckoned as buyers, and as such ready to pay a higher price than individual purchasers. Finlay J., upon the evidence which had been adduced before him, held that a trust company would not, and could not, have been in the market, because the directors would have refused to register such a purchaser. I have followed the Irish Court of Appeal in considering the question from the point of view that the purchaser would be registered: but that view does not necessarily introduce the trust companies into the market. They might and probably would be deterred by the possibility of friction on the question whether they

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would be put upon the register, and the consideration that if that impediment were overcome, it would not have been without some lengthy discussions and possible expense. The view of Channell J. as to the general survey which ought to be taken of those available as purchasers, without regard to any particular person or class, ought in my opinion to prevail.

It is thus that Lord Plender has given his evidence, and that Finlay J. has reached his figures of 355*l.* and 351*l.*, based upon that evidence. The learned judge recalls that Lord Plender said he considered that everybody was in the market: "he did not exclude anybody or include anybody in particular." That is to my mind the right course. The addition proposed by the learned judge of 40*l.* to each of the above figures was based upon Mr. Hely Hutchinson's evidence, which contemplated a particular trust company, having particular advantages for a purchase of such shares by reason of its allied companies or subsidiaries. That evidence is too particular, in my opinion, and does not fit in well with an "open market."

The result is that in my judgment Finlay J. was right in the figures that he adopted for the value of this property, namely, 355*l.* and 351*l.* per share, and that the appeal ought to fail and be dismissed with costs. I have also explained my reasons why I think the cross-appeals fail and must also be dismissed with costs. But my colleagues will deliver their judgments, with which I regret I have not been able to concur on this difficult question.

SLESSER L.J. By s. 7, sub-s. 5, of the Finance Act, 1894, it is provided that: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." In the two petitions by way of appeal under s. 10 of the Finance Act, 1894, before us, the question has arisen how this direction as to valuation is to be applied in the case of certain shares held at the time of their deaths in a brewery company called Mann, Crossman & Paulin, Ld., by two gentlemen deceased, Sir William Thomas Paulin and Mr. Percy Crossman.

The shares of these two gentlemen were of the same kind in the same company, and, subject to certain adjustments as to value which have been determined, the principles to be decided are the same in both cases, and they fall, therefore, to be considered together.

The problem arises in this way: Under the articles of association severe restrictions are placed upon the assignability and value of the shares on the death, if they were to be sold. The executors would have been bound to give notice in writing to the company of their intention to sell, such notice would have constituted the company their agent for the sale of the shares and the company would be required to sell them to a member of the company holding ordinary shares; in the case of Mr. Percy Crossman for the agreed figure of 221*l.* 4*s.* 5*d.* and in the case of Sir William Paulin of 209*l.* 13*s.* 8*d.*, the differences being accounted for by the respective dates of their deaths. The provision in the articles of a sale to the public on failure of a family purchaser may, on the view of Finlay J., be discarded, and I consequently disregard it. On the other hand, the values on the assumption that the shares would be sold to an outside purchaser, subject to the restrictions in the articles, which would prevent such outside purchaser from freely disposing of the shares, have been ascertained to be 351*l.* and 355*l.* respectively.

The statute making no special provision for the valuation of shares of this nature, three possible views have been taken in the past, all of which find expression in the judgments of various judges in the case of the *Attorney-General of Ireland* v. *Jameson.* (1)

These three views are as follows: (*a*) The opinion of Palles C.B. in the lower Court in Ireland to the effect that: "We must exclude the consideration of such provisions in the articles of association as would prevent a purchaser at a sale from becoming a member of the company, registered as such in respect of the shares purchased by him at such a

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(1) [1904] 2 I. R. 644; [1905] 2 I. R. 218.

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supposed sale." (1) He disregards both the restrictions imposed upon the hypothetical purchaser and also the restrictions upon that purchaser regarded as a vendor when he is upon the register. This view, which did not find complete favour with the Court of Appeal in Ireland, is not now supported by the Crown. (*b*) The opinion of the Court of Appeal in Ireland (Lord Ashbourne, Chancellor, and FitzGibbon, Walker and Holmes L.JJ.), which was that the principal value of the shares ought to be estimated on the terms that the purchaser should be entitled to be registered as holder of the shares, but should take them subject to the restrictions imposed by the articles on the alienation by him of the shares—a view for which the Crown here argues—and (*c*) the opinion of the majority in the King's Bench Division in Ireland (Kenny and Boyd JJ.) that in estimating the value, the special provisions in the articles of association must be taken into account, both as regards the rights of a purchaser and as regards the rights of alienation by that purchaser when he is upon the register. This last view is that now contended for by the executors.

It must be remembered that the subject-matter to be valued is the property passing at the time of the death and that this property, so far as it is here to be considered, consists of shares. Now a share in a company, as was pointed out by Farwell J. in *Borland's Trustee* v. *Steel Brothers & Co.* (2), consists of an interest measured by a sum of money and made up of various rights contained in the contract. And, "the contract contained in the articles of association is one of the original incidents of the share." This view of the nature of a share is now held beyond question in this country, and the judgment of Palles C.B. to the effect that the provisions affecting the transferability of shares are only collateral to the shares and "that the character and nature of a share in this company is identical with that which it would have been had the articles not contained these clauses" (3) is so inconsistent with what I believe to

(1) [1904] 2 I. R. 689.
(2) [1901] 1 Ch. 279, 288.
(3) [1904] 2 I. R. 688.

be the true nature of a share that I cannot regard his judgment in that case as unaffected by such a view.

If, however, these shares are to be regarded as containing as necessary incidents the obligation, if they are to be sold, of their being offered through the agency of the company to other holders of ordinary shares at the limited price of something over 200*l.*, I cannot see how the purchaser of these shares in the open market can be deemed to be upon the register at a higher price without doing violence to such necessary elements in the proprietary value of the share itself. This was the view which commended itself, as I have said, to the majority of the Court of the King's Bench Division in Ireland, and I agree with the reasons which they there state, though not with the order there made, which appears to have been founded upon peculiar considerations of the "fair value" of the shares, considerations which do not apply here. Thus Kenny J. said (1): "In the present case there is no absolute estate, right, or interest conferred, the natural incidents of which are subsequently fettered. The thing acquired by membership in the company is, from its initial stage, a restricted and fettered thing. It never had attached to it any rights of free alienation which were sought to be affected," and, per Boyd J. (2): "By the death of Mr. Jameson, nothing passed to his executors except what he himself possessed. Had Mr. Jameson desired during his lifetime to sell his shares, he could not have claimed the right to sell them at a greater price than the fair value fixed by the articles of association. This price and the restrictive clauses were as much terms of his contract as his title to the shares. . . . With the restrictive conditions in the articles by which a purchaser of his shares would be bound if sold in the open market, it would be folly on the part of such purchaser to give even the par value. . . ."

There remains for consideration that intermediate view which I have mentioned was accepted by the Court of Appeal in Ireland in *Jameson's* case (3), and since followed in the Irish Free State in *Smyth's Case* (4), and in Scotland in

(1) 1904 2 I. R. 671.
(2) Ibid. 679.
(3) [1905] 2 I. R. 218.
(4) [1931] I. R. 643.

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Salvesen's Trustees v. *Inland Revenue Commissioners.* (1) It is this decision which Finlay J. felt constrained to follow in the present case, and it therefore needs careful consideration. Lord Ashbourne criticizes the view of the King's Bench in Ireland as an indefensible extreme on the ground that it gives "really no adequate significance to the words of the Act requiring the Commissioners to estimate the price which the shares would fetch in the open market." I am unable to understand this difficulty. I share the doubts expressed by Kenny J. that "The Legislature contemplated such a metamorphosis of the incidents of the particular property by the use of the words 'if sold in the open market'." (2)

As Lord Ashbourne pointed out (3), "an actual sale in open market is out of the question; a feat of imagination has to be performed." But, if I may say so, a feat no more difficult than the familiar assumption of a hypothetical tenant in rating cases of a sewer or of an electricity undertaking which by statute cannot be alienated or let. I think that the words "open market" in the section contemplate a market in which every would-be purchaser may be regarded as present, but, being present, we have still to consider the nature of the property which he seeks to buy and if such property has necessarily in it qualities which confine its value, the mere unrestricted number or absence of limit of the class of hypothetical purchasers does not remove the limitations of value incident to the property itself; thus I have no difficulty in contemplating that an auction with a reserve minimum price may take place in an open market; the case of a maximum reserve price, though highly improbable, would not be impossible in an open market, and many other illustrations must occur to the mind. "A value, ascertained by reference to the amount obtainable in an open market, shows an intention to include every possible purchaser. The market is to be the open market, as distinguished from an offer to a limited class only, such as the members of the family": per Swinfen Eady L.J. in *Inland Revenue*

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(1) (1930) Sc. L. T. 387.
(2) [1904] 2 I. R. 674.
(3) [1905] 2 I. R. 226.

Commissioners v. *Clay* (1). This and no more seems to my mind necessarily to be imported by the phrase "open market." FitzGibbon L.J. in *Jameson's* case (2): "The price was to be that which a purchaser would pay for the right to stand in Henry Jameson's shoes . . . . The price was what the shares were worth to Henry Jameson at his death—in other words, it was what a man of means would be willing to pay for the transmigration into himself of the property which passed from H. Jameson when he died." I proceed on the same consideration but arrive at a different conclusion. I think that the price which the purchaser would pay would not be more than the rights which Sir William Paulin and Mr. Crossman themselves possessed, which would be rights bound up with the obligation to hand them over to the company for sale at 200*l.* odd per share. Holmes L.J. follows Lord Ashbourne in objecting to the highest price which could actually be obtained under the articles as not being based on a sale in open market as required by the Act, and therefore the problem really comes back to this: Can one give effect to the requirement that there shall be assumed an open market without doing violence to the conditions contained in the articles which in reality limit the price? For the reasons above stated, which were stated by Kenny J. in *Jameson's* case (3), I think that the hypothetical sale in the open market does not require such violence to the subject-matter of what is presumed to be sold at the death as is indicated by final judgments of the Courts in Ireland and in Scotland. Nor can the hypothesis of an open market by itself place the vendor upon the register, regardless of the constraints and circumstances which would place him there.

Moreover, I have difficulty in reconciling the compromise propounded in *Jameson's* case (4), whereby the restrictions on transfer by the purchaser when he is upon the register, notwithstanding their view of the compelling nature of the words "open market," can still be considered. If the purchaser is to be considered as on the register, I do not

(1) [1914] 3 K. B. 466, 475.
(2) [1905] 2 I. R. 230.
(3) [1904] 2 I. R. 671.
(4) [1905] 2 I. R. 218.

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know why in his capacity as vendor he should be held subject to the restrictions of the articles. Lord Ashbourne's view of the "open market" seems to me consistent with the opinion of Palles C.B.; and the Attorney-General of Ireland, who said there that the Commissioners should assume an unfettered sale in the open market to the highest bidder which would be free from the clogs on alienation contained in the articles, on Lord Ashbourne's view, scarcely deserves the stigma of arguing an "indefensible extreme." Walker L.J. says he also thinks (1): "that the argument for the Crown cannot, as to the position of the purchaser buying in the hypothetical open market, be accepted." But again I find difficulty on the basis of that judgment in understanding the logic of the distinction.

In my judgment, the value contended for by the executors in this case is correct and this appeal should be allowed and the cross-appeal dismissed. As Romer L.J. has come to a similar conclusion, that judgment will be the judgment of the Court.

ROMER L.J. At the time of his death Sir William Thomas Paulin was the registered holder of 1600 ordinary shares in a company called Mann, Crossman & Paulin, Ld. These shares passed upon his death within the meaning of s. 1 of the Finance Act, 1894, and estate duty accordingly became payable upon the principal value thereof. The question to be determined upon this appeal is how that principal value is to be ascertained. By s. 7, sub-s. 5, of the same Act it is provided as follows: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." The sub-section would not at first sight seem to cause any difficulty. The words "if sold in the open market" do not of course mean if sold in any particular market, or include any "market" at all in the legal sense of the term. They merely mean "if offered for sale to the world at large—no

(1) [1905] 2 I. R. 236.

one being excluded from making an offer if he thinks fit so to do."

But the shares in the company now in question are by virtue of the company's articles of association subjected to somewhat stringent restrictions as to transfer, and it is the existence of these restrictions that has created the difficult question arising on the present appeal. That question may be stated as follows: Are the shares to be valued on the footing that a purchaser would, in spite of the articles of association, be forthwith entitled to be put upon the company's register in respect of them, or are they to be valued upon the footing that the purchaser would only obtain such right in respect of the shares as Sir William Paulin could at the time of his death have conferred upon him consistently with those articles. It does not seem necessary for the purpose of this judgment to state in detail what these latter rights were. It is sufficient to say that if upon Sir William's death it had been desired to sell the shares, his executors would have been bound to give notice in writing to the company of such desire, and such notice would have constituted the company their agent for the sale of such shares at 209*l.* 13*s.* 8*d.* per share to any member of the company holding an ordinary share or ordinary shares. If, but only if, no such member willing to purchase the shares should have been found within three months from service of the notice, the executors would then have been entitled to sell the shares to any person and at any price. In that event it is agreed that a sum of 395*l.* per share could have been obtained if the possibility of a trust investment company becoming a purchaser is to be taken into consideration, and 355*l.* per share if that possibility be excluded. Now it is certain that if the shares had been offered to the other ordinary shareholders in accordance with the articles of association, the whole of them would have been taken up by such members, and no more than 209*l.* 13*s.* 8*d.* per share would have been obtained for them. If, therefore, the hypothetical purchaser that is contemplated by s. 7, sub-s. 5, of the Act is to be treated for the purposes of that sub-section as acquiring no greater rights than Sir

William Paulin possessed at the moment of his death, and these must be the rights that passed to his executors, he would acquire in effect no more than a right to receive a sum of 209*l.* 13*s.* 8*d.* per share, and would not, of course, pay a penny more. If, however, he is to be treated as acquiring the right to be placed upon the register he would pay 395*l.* or 355*l.*, as the case may be.

In order to determine upon which basis the principal value of the property passing upon Sir William Paulin's death ought to be ascertained, it is essential in the first place to find out the precise nature of that property, or in other words, the precise nature of what is called " a share " in a company. This matter was fully considered by Farwell J., as he then was, in the case of *Borland's Trustee* v. *Steel Brothers & Co.* (1) In that case the question to be decided was whether provisions in a company's articles of association compelling a shareholder at any time during the continuance of the company to transfer his share to particular persons at a particular price were or were not void as being repugnant to absolute ownership, or as tending to perpetuity. The learned judge held that they were not, for reasons that appear to me to be quite conclusive. It has not, indeed, been suggested in the present case that the provisions in the articles of association as to the transfer of shares are invalid. But in the course of his judgment Farwell J. made some observations upon the nature of a share in a company that are of great importance (2): " A share," he said, " according to the plaintiff's argument, is a sum of money which is dealt with in a particular manner by what are called for the purpose of argument executory limitations. To my mind it is nothing of the sort. A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum

(1) [1901] 1 Ch. 279. (2) [1901] 1 Ch. 288.

of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."

With these observations I respectfully agree. It is impossible to treat a share as being an interest in the company's assets, or an aliquot share in the company's capital, and to regard the contract arising from and contained in the company's articles of association as a separate and independent thing. That contract and the rights and liabilities that flow from it are of the very essence of the share. When, therefore, the owner of a share dies, what passes upon his death and what has to be valued for the purpose of estate duty is nothing more than the totality of his rights and liabilities as they exist under the provisions of the Companies Act and the constitution of the particular company.

This consideration seems to me to lie at the very root of the matter with which we have to deal in this case. It is obvious that for the purpose of ascertaining the principal value of property passing on the death in the manner prescribed by s. 7, sub-s. 5, of the Finance Act, 1894, the Commissioners must assume that the property can be transferred to the hypothetical purchaser. But there is nothing in the sub-section even remotely suggesting to my mind that what is to be treated as being sold is something other than the property that passes upon the death. If a share in Mann, Crossman & Paulin, Ld., be regarded merely as a right to get placed on the register of members with the rights and subject to the liabilities that would result from such registration, the principal value of such share must of course be ascertained upon the footing that the right can be conferred upon a purchaser in the open market. If, on the other hand, as I think is the case, the inability to confer upon such a purchaser a right of registration, is a part of the essence of a share, its value must be ascertained with a due recognition of that fact. In this respect a share in no way differs from the benefit under any other contract that passes upon death. The purchaser of the benefit of the contract will stand in no better position than the person from whom it has passed. He cannot take the benefit without discharging the liabilities, and the benefit must be valued upon this footing.

It must, however, be observed that the principal value of the property that passes does not necessarily bear any relation to the value it possessed in the hands of the person from whom it passes upon death, or to the value it will possess in the hands of the person on whom it may devolve under his will or otherwise. The value chosen by the Legislature for the purposes of estate duty is the value it will possess in the hands of a hypothetical purchaser who buys at the time of the death of the person, and in the case of any person dying on or after April 30, 1909, the Commissioners must take into account any depreciation in value of the property proved to have been occasioned by the death of the deceased. Let me now apply these considerations to the facts of the present case. During his lifetime the shares of which Sir William Paulin was the registered holder possessed without doubt value to him far in excess of their transfer value as fixed by the articles of association. He was entitled, for instance, to receive the large dividends that were declared from time to time upon the shares, and he had the power of selling the shares under the first sub-section of art. 34 of the articles of association to any one or more of the persons therein mentioned at any price that they were willing to pay. But on his death there came into operation as an essential quality of the shares the obligation of offering them for sale at the transfer price, and no purchaser of the property that passed upon his death (which was no more and no less than Sir William's interest in the company) would have been paid any more. It is true that by his will he bequeathed 1000 of his shares between his two daughters equally, and those shares are worth to them 355*l*. each. But, as I have already pointed out, this is immaterial, the only question being what a purchaser in the open market would have given for the property at the time of the testator's death.

I must now turn to the decision of the Irish Court of Appeal in *Attorney-General of Ireland* v. *Jameson* (1), a decision that is in direct conflict with the views that I have been endeavouring to express. In that case certain shares in a company called John Jameson & Son, Ld., passed on the death of the registered holder thereof. The articles of association of the company contained restrictions upon transfer similar in some respects to those contained in the articles in the present case. No shares could be transferred to a person who was not a member so long as any member was willing to purchase the same at a price prescribed by the articles and therein called the " fair value." The question to be determined in the case was whether the principal value of the shares for the purposes of estate duty was to be taken to be their " fair value," or the price that a purchaser in the open market would pay for them if he could be at once placed upon the register of shareholders. There also arose the question whether in the latter case the purchaser when on the register was to be considered as holding the shares free from the restrictions on transfer contained in the articles. In the Court of first instance the case was heard by Palles C.B. and Boyd J. and Kenny J. (2)

It was held by a majority of the Court that, in estimating the principal value of the shares, regard was to be had by the Commissioners to the special provisions in the articles of association with reference to alienation and transfer of the shares of the company and to the " fair value " thereof. The majority appear to have taken the view for which the appellants are contending in the present case. Kenny J. in reference to the nature of a share said this (3): " In acquiring these rights—that is, in becoming a member of the company—he is deemed to have simultaneously entered into a contract under seal to conform to the regulations contained in the articles of association. Whatever obligations are contained in these articles, he accepts the ownership of the shares and the position of a member of the company, bound and controlled by them. He cannot divorce his money interest, whatever

(1) [1905] 2 I. R. 218.
(2) [1904] 2 I. R. 644.
(3) Ibid. 670.

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it may amount to, from these obligations. They are inseparable incidents attached to his rights, and the idea of a share cannot, in my judgment, be complete without their inclusion. . . . . He could not, nor could his personal representatives, retain the mere money interest and repudiate the contracts entered into in connection with it. The money interest and the contractual obligations form one whole, and no member could be heard to say that he had a right to retain the former and disclaim the latter." These observations were made by the learned judge when dealing with the contention on the part of the Crown that the restrictions on transfer were invalid. But they were equally relevant to the question how the shares should be valued for the purposes of estate duty, and that question was dealt with by the learned judge in these words (1): "In dealing with those shares, it therefore becomes necessary to inquire what is the nature—firstly of the subject-matter that passed on the death and of which the deceased was competent to dispose; and secondly, of the supposititious sale under the 5th sub-section of the 7th section of the Act. I do not propose on this branch of the case to repeat the considerations that influenced me on the question of repugnancy in arriving at the conclusion that the interest of the deceased in the company was one in which, from its very creation, the elements of free and uncontrolled disposition were absent. Compared with the absolute right to go into the open market and to sell to any outsider and for the best price property that was subject to no restrictions on alienation present or future—this interest was what I may venture to call a dwarfed and stunted thing. But it, and it alone, was what the deceased had power to dispose of in his lifetime, and which his executors were competent to sell and transfer after his death. How, then, does the Finance Act operate on such a subject-matter? I cannot help expressing my surprise that this question of the value of shares in a private company never presented itself before 1894. For probate and residuary account purposes the ascertainment of the market value would seem to have been just as necessary before as after the Act. Are we now to say that for the purposes of levying estate duty the executors are to be supposed to have in their possession a marketable commodity affected by less restrictions than it was subject to in the hands of their testator? The Crown argument goes to this, that there cannot be such a supposititious sale as is contemplated by the 5th sub-section unless we proceed on the basis of a sale to any member of the public, and thus permit, by assumption, an evasion of the 18th article of association which would be forbidden in the actual working of the company; and, in the administration of the estate of the testator, could not be effected. I cannot think that the Legislature contemplated such a metamorphosis of the incidents of the particular property by the use of the words 'if sold in the open market'."

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(1) [1904] 2 I. R. 673.

I have cited these two passages at length because they exactly express the views that I myself entertain upon the subject.

The matter was then taken to the Court of Appeal and was heard by Lord Ashbourne and FitzGibbon, Walker and Holmes L.JJ. The Court decided that the principal value of the shares ought to be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be registered as the holder of the shares, but should take and hold them subject to the articles of association including the articles relating to the alienation and transfer of the shares of the company. In other words, for the purpose of the hypothetical sale the vendor was to be considered as being freed from the restrictions, but the purchaser, after the sale, was to be considered as being bound by them.

The leading judgment was given by Lord Ashbourne, and proceeded until towards its conclusion in terms that command my respectful assent. He said (1): "The course taken by the Crown compels us to consider with care in reference to these 750 shares what passed on the death of Henry Jameson. The only possible answer that can, in my opinion, be given

(1) [1905] 2 I. R. 224.

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is—the entire property in the shares, so far as he was competent to dispose of them at the time of his death. He was only competent under and pursuant to the articles of association. These articles defined and circumscribed his powers. At the time of his death he was not competent to dispose of the shares without complying with those articles. The articles also prescribed the position of his executors in reference to his shares. Can it for a moment be suggested that the shares were one thing in the hands of Henry Jameson, and something else in the hands of his executors? Surely there must be the same subject-matter before and after death." Then after rejecting the contention of the Crown that the restrictions were void he proceeded as follows: "Therefore, I take the case to be that the executor took on his death the same subject-matter which Henry Jameson owned in his lifetime, and was at his death competent to dispose of, i.e. the 750 shares in the Jameson Company, subject to and controlled by its articles of association. To hold otherwise would be to say that the shares were more valuable in the hands of his executors than in the hands of Henry Jameson, that he was fettered while they were free—that the articles bound him and could not control them. He deliberately became a shareholder in this family company with its articles and its contracts, and his shares cannot be considered apart from this contractual position. The share cannot be split up and considered apart from its contractual incidents. The articles are part and parcel of the share, and not collateral and separable. He must be assumed to have absolutely bound himself to obey and conform to the articles. I am unable to see that the provisions as to pre-emption and 'fair value' can be ignored and put aside as separate. They must be faced and dealt with as reasonable methods honestly adopted by this company for the safeguarding of the continuance of the Jameson interest in this Jameson Company."

So far, therefore, he was prepared to agree with Kenny J. in the Court below. But then he turned to the Finance Act, 1894, and found something there which he thought precluded him from giving effect to his own views. He said: "How can such shares in such a company with such articles have their value estimated at the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market? An actual sale in open market is out of the question. A feat of imagination has to be performed. Two suggestions have been put forward in argument. The Attorney-General says that the Commissioners should assume an unfettered sale in the open market to the highest bidder, who would be free from the clogs on alienation in the articles. The defendants, on the other hand, contend that the Finance Act is satisfied by taking the par or 'fair value' of 100*l.* per share as the capital value which the Commissioners should estimate as the price which the shares would fetch if sold in the open market. Each side rushes into an indefensible extreme. The argument of the Attorney-General, which seeks to brush aside the articles and to vest in the executors a property which Henry Jameson never possessed, would ascribe to the Finance Act the power of making a new subject-matter. The argument of the defendants clings desperately to the articles, and gives really no adequate significance to the words of the Act requiring the Commissioners to estimate the price which the shares would fetch in the open market. The solution lies between the two."

The Lords Justices, as I read their judgments, also based their decisions against the contention of the defendants upon the ground that the words "in the open market" in s. 7, sub-s. 5, would not be given effect to unless the purchaser were given the right to be placed upon the register, though the greater part of their judgments seems to be addressed to the Crown's contention that the purchaser would hold free from the restrictions as to transfer. Their reasons for rejecting that contention seem unanswerable, and are accepted by the Crown in the present case. But I cannot help thinking that those very reasons should logically have led them to accept the defendant's contention upon the first point. FitzGibbon L.J. for instance said (1): "until this case, I am not aware of any attempt made by the Crown to enhance the value for the purpose of assessment above the value to the holder; but this would be the effect of estimating the value under s. 7, sub-s. 5, upon the assumption that any depreciating incidents affecting the property in the hands of the holder while he lived were to be left out of account in determining the price which an imaginary purchaser would give for it in a supposed 'open market'." And yet in holding that the imaginary purchaser was to be treated as entitled forthwith to be placed upon the register, and that the price he would pay ought to be estimated upon that basis, the "depreciating incidents" were surely wholly ignored. They were ignored, however, merely because it was thought that the language of the Act necessarily required that this should be done. For myself I can see no such necessity. An open market merely means a market from which no one is excluded, and in such a market any and every kind of property can be offered for sale. It may be that some particular kind of property would fetch a very small sum, or would fail to attract a purchaser at any price. In the latter case the principal value of the property would have to be estimated by the Commissioners as being nothing. The Act would not require the Commissioners, in order to escape from making such an estimate, to treat the property as something other than it is. In the present case I can see no reason whatsoever for thinking that the interest in the company possessed by Sir William Paulin could not be sold in the open market. If in his lifetime he had publicly offered to sell that interest as at the time of his death to the highest bidder and had entered into a contract with that bidder the moment before his death, no one could pretend that he had not sold his interest in the open market. On his death it would have been incumbent on his executors to carry out that contract and to see that the purchaser obtained the benefits that but for the contract would have accrued to Sir William's estate by reason of his interest in the company, that is to say by reason of the contractual relationship that existed between him and the company. The purchaser would thus obtain from the executors the sum of 209*l.* 13*s.* 8*d.* per share if the other members, or any of them, exercised their rights of pre-emption and would only be entitled to have himself placed upon the register if and so far as such rights of pre-emption failed to be exercised. This is all the purchaser would have obtained or would have expected to obtain from his contract, and he would certainly not have agreed to pay more than the 209*l.* 13*s.* 8*d.* per share. The Court of Appeal in Ireland, however, seemed to think that such a purchaser would have been entitled to stand in the shoes of Sir William in relation to the company, that is to say, to have his name substituted for that of Sir William in the contract that subsisted between Sir William and the company. This would, no doubt, have been so if Sir William had been entitled by virtue of his contract with the company so to substitute the purchaser for himself. But if that contract gave him no such power, the purchaser would obtain no right of substitution. I can best explain my meaning by a simple illustration. Suppose that a man contracted with an eminent artist for the painting of a portrait of the man's wife. The man dies before the portrait has been painted. The benefit of the contract is property that passes on the man's death, and the value of that property falls to be ascertained in accordance with s. 7, sub-s. 5, of the Finance Act. To the man in his lifetime the contract might have been of considerable value, and so it might have been to the wife if he bequeathed the benefit of it to her. But the Legislature has elected to take as its value the price that a purchaser would give for it if sold in the open market. Now if offered for sale in the open market the benefit of the contract would fetch little, if anything, inasmuch as the purchaser would have no means of compelling the wife to give sittings to the artist. But this affords no reason for substituting the name of the purchaser for the dead man, and turning the contract into one to paint a portrait of the purchaser's wife. And yet this is what the Court of Appeal in Ireland would have thought themselves forced to do by virtue of the Finance Act. If the contract with the artist had been to paint the dead man's wife or such other person as he or his executors should nominate the matter would be entirely different. But whether

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(1) [1905] 2 I. R. 230.

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the contract be in the one form or the other, the benefit of it is equally capable of being sold in the open market. The only difference would be that in the first case the price obtained might be very small indeed, and in the latter might be considerable if the artist were sufficiently eminent. If, however, the contract were in the first of the two forms, I cannot see that the words of the Act would justify, and still less necessitate, the substitution for it of a contract in the second form. In other words, I can find nothing in s. 7, sub-s. 5, to warrant the Commissioners in estimating the value of a property passing on death by reference to the price that would be paid in the open market for property that did not so pass.

For these reasons I find myself unable to agree with the decision of the Court of Appeal in the *Jameson* case. (1) Finlay J., without expressing any opinion of his own, very properly thought it was his duty to follow it. But it is not binding upon us—and though we naturally treat it with the respect due to the eminent judges who decided it, it is our duty if we disagree with it to say so, notwithstanding the lapse of time, for we are dealing with a Taxing Act. As it is my misfortune to have arrived at a different conclusion from that reached by the Master of the Rolls and those learned judges, I can only say that in my opinion the appeal of Sir William Paulin's executors should succeed, and that the principal value of each of the shares in question should be declared to be 209*l.* 13*s.* 8*d.* and no more.

It follows from what I have already said that in my opinion the second appeal should also be allowed and the principal value of each share declared to be 221*l.* 4*s.* 5*d.*

In both cases the cross-appeal of the Crown must be dismissed.

Appeals allowed. Cross-appeals dismissed.

Solicitors: *Crossman, Block & Co.; Solicitor of Inland Revenue.*

(1) [1905] 2 I. R. 218.

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JACOBS AND OTHERS *v.* LONDON COUNTY COUNCIL AND ANOTHER.

[1934. J. 245.]

SHAW AND OTHERS *v.* SAME.

[1934. S. 371.]

Infants—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *ss.* 1, 2—*Statute applicable to claims by infants.*

The Public Authorities Protection Act, 1893, applies to an action by an infant against a public authority; the action must therefore be brought within six months next after the act, neglect, or default complained of.

Decision of Roche J. affirmed.

APPEALS from a decision of Roche J.

In these actions the plaintiffs, young children, suing by their next friends, claimed damages in respect of the alleged negligence of the defendant council as the authority for the maintenance and supervision of the hospital in which the plaintiffs were being treated, and against the second defendant, who at all material times was the medical superintendent of the hospital. The various plaintiffs were admitted to the hospital in October and November, 1932, and in January and February, 1933, and in or about those months contracted the illness from which they suffered owing, as they said, to the negligence of the defendants, and the writs in their actions were issued on January 31, 1934.

The defendants denied negligence and pleaded that the actions not having been commenced within six months of the alleged act, neglect or default complained of were barred by s. 1 of the Public Authorities Protection Act, 1893.

By an order of the Master it was directed that the question of law whether the plaintiffs' claims or any part thereof were barred by the Public Authorities Protection Act, 1893, should be set down for trial in the special paper under Order xxv., r. 3.

Roche J., who tried this preliminary question, said, in giving judgment, that the only argument put forward in favour of the view that the Act of 1893 was not a bar to the plaintiffs' claim was that the plaintiffs were infants, and the contention was that under the Limitation Act, 1623, no limitation ran against them until they attained the age of twenty-one. In his judgment that argument was not well founded. The Act of 1893 was absolute in its terms, and rendered an action which was brought outside the limitation period, whether brought by a person of full age or by an infant, incapable of success. The statements of claim would accordingly be struck out, but liberty would be given to the plaintiffs to plead again as to matters which they might rely upon which arose within the period of six months prior to the date of the issue of the writs.

The plaintiffs appealed.

Weitzman for the appellants. By s. 3 of the Limitation Act, 1623, certain actions, of which the present are included, to be maintainable must be brought within six years of the accruing of the cause of action; but s. 7 of the same Act says that in the case of (inter alios) infants, actions by them may be brought " so as they take the same within such times as are before limited after their coming to or being of full age "; that is, infants, under that Act, could bring their actions within six years after attaining their majority. It is said, however, and has been held by Roche J., that this has been altered in actions by infants against public authorities by the Public Authorities Protection Act, 1893. (1) That view is wrong. The only effect of the 1893 Act on the Limitation Act, 1623, is to alter the period within which a

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(1) Public Authorities Protection Act, 1893, s. 1: " Where after the commencement of this Act any action . . . . is commenced in the United Kingdom against any person for any act done in pursuance, or execution, ... of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

(*a*) The action . . . . shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof: "

. . . .

Sect. 2: " There shall be re

person who has a cause of action during infancy may bring his action after attaining full age; he must bring his action within six months thereafter instead of within six years, as was the case under the Act of 1623. Except to that extent the last mentioned Act, so far as regards infants, has not been affected by the Public Authorities Protection Act, 1893. In *Garnett* v. *Bradley* (1) Lord Blackburn, dealing with the repealing section of a statute, said this: "Inasmuch as there are certain statutes enumerated which are repealed, expressio unius est exclusio alterius, and accordingly those statutes and those alone are repealed." That applies precisely to the present cases: the Public Authorities Protection Act sets out in the schedule the various enactments which are repealed, and the Limitation Act, 1623, is not included; it therefore continues operative subject to the qualification already mentioned. See also the observations of Lord Selborne in *Seward* v. "*Vera Cruz*" (2), where he said: "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." Again, in *Blackpool Corporation* v. *Starr Estate Co.* (3) the observation of Lord Haldane that "individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest," clearly supports the view now contended for that the special privileges of infants are unaffected by the Act of 1893; see further per Lord Hobhouse in *Barker* v. *Edger* (4); per

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pealed as to the United Kingdom so much of any public general Act as enacts that in any proceeding to which this Act applies—

. . . .

(*b*) the proceeding is to be commenced within any particular time;

. . . .

and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned. . . . ."

(1) (1878) 3 App. Cas. 944, 965.

(2) (1884) 10 App. Cas. 59, 68.

(3) [1922] 1 A. C. 27, 34.

(4) [1898] A. C. 748, 754.

Scrutton L.J. in *The Danube II.* (1); per Sir Henry Duke, Pres., in *The Wilhelmina* (2), where the effect of a later statute on an earlier one was considered.

Singleton K.C. and *Dickens* for the respondents were not called upon.

GREER L.J. Notwithstanding the vigorous argument we have heard on behalf of the appellants I have come to the conclusion that the judgment of Roche J. put the right interpretation on the Public Authorities Protection Act, 1893, and rightly refused to accept the exception in favour of infants contained in the Limitation Act, 1623, as having any application to these cases. Roche J. said: "This matter arises under an order of the Master in two actions brought against the London County Council and one of the doctors employed by them in a hospital, to determine whether the plaintiffs' claims or any part thereof are barred by the Public Authorities Protection Act, 1893. I decide that the plaintiffs' claims are so barred, except in so far as the plaintiffs, by amendment, are relying upon causes of action which arose within six months before the issue of the writs. I so decide because the main causes of action and complaint arose outside the period of six months, and because, in my opinion, it is plain that the Public Authorities Protection Act, 1893, applies to these cases. The only argument against its application that was relied upon was that the plaintiffs were infants, and that no limitation ran against them until after they attained the age of twenty-one. In my opinion that argument is not well founded. The Act of 1893 is absolute in its terms and renders an action, which is brought outside the limitation period, incapable of success, whether it is brought by a person of full age or by an infant." I agree with that view. In the Act of 1893 I find words which apply to "any action, prosecution, or other proceeding . . . . commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty

(1) [1921] P. 183, 188. (2) [1923] P. 112, 125.

or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority." These words express, as widely as it is possible to do, the kind of action or proceeding to which the statute applies; and then the Act proceeds: "(*a*) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof." It is not without importance to note that those responsible for the statute considered what qualification should be put upon the period of limitation established by the Act, and the only qualification grafted upon that period is in the case of the continuance of injury or damage, in which case the period of six months is to be reckoned from the ceasing thereof.

It has been argued that by reason of the limited repeal in s. 2 of the Act of 1893 that Act must be read as preserving the right given by the Limitation Act, 1623, to infants, to married women, lunatics, and to persons who were beyond the seas at the time the cause of action arose. If such a result as that contended for on behalf of the appellants had been intended the Act would have so provided in terms. In my opinion it is impossible to import into the Act of 1893 the exceptions which were in the Limitation Act, 1623. The repeal section in the Act of 1893 is there for the purpose of preserving in all cases to which the Act does not apply the special protection given to infants in all actions then in force; it is not there for the purpose of giving to infants and the others mentioned in s. 7 of the 1623 Act protection against the special privileges given to public authorities under the Act of 1893. The appeal fails.

MAUGHAM L.J. I am of the same opinion, and for the same reasons. The Limitation Act, 1623, after laying down a series of limitations, proceeded by s. 7 to give certain persons rights of a more generous character with regard to the bringing of actions under s. 3. It is a mistake to suppose that the persons to whom these additional rights were given were merely infants. They constituted at that date a large class, including femes covert, persons non compos mentis, prisoners, and those beyond seas. Those persons were to be at liberty to bring their actions provided they did so within the times previously limited, after they came of age, if they were infants, or after becoming discovert if married, or becoming of sound mind if insane, or being set at liberty, if they were prisoners, or, if they had been beyond the seas, had returned to this country. As regards some of the persons thus enumerated the law has been altered by subsequent legislation; for example, persons beyond the seas are no longer treated as under a disability entitling them to special rights; nor are prisoners entitled to those special rights; while as to married women, they are for this purpose apparently treated as discovert so that the disability of coverture is in effect abolished.

That, however, does not affect the point that when the Act of 1623 was passed large classes of persons, including infants, were regarded as persons upon whom special rights should be conferred in the matter of bringing actions. For my part I do not regard those classes of persons, including infants, as being in the same position as specified individuals with regard to whom the section of an Act of Parliament has made a special provision. I say that because it seems to me that in deciding in the way we do we are not for a moment questioning or infringing the rule of construction laid down, for example, by Lord Haldane in *Blackpool Corporation* v. *Starr Estate Co.* (1), nor are we infringing the analogous but somewhat different rule stated by Lord Hobhouse in *Barker* v. *Edger* (2), where he said that " when the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly." In the present cases the difficulty in the appellants' way is that after the enactment of the qualifications in s. 7 of the Act of 1623 upon the provisions contained in s. 3 of that statute, there was passed the Act of 1893, which contains the perfectly general and unambiguous

(1) [1922] 1 A. C. 27, 34.

(2) [1898] A. C. 748, 754.

statement that in the case of any action or other proceeding commenced in the United Kingdom in respect of any act done in pursuance of any public duty or authority, or in respect of any alleged neglect or default in the execution of any Act, it shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of. That provision being prima facie applicable to the present cases, it is contended that it must be read subject to some qualification or alteration so as not to affect the proviso to s. 3 of the Limitation Act, 1623, contained in s. 7 of that Act. It is plain that neither s. 3 nor s. 7 has been abrogated; those sections remain in force, and s. 7 in particular still confers on infants the right to commence an action on contract or in tort against any ordinary defendant within the period mentioned in s. 3 of the Act after the infant has attained the age of twenty-one. What Roche J. decided is that when the action is one of that limited class in which the defendant is a person who has done or neglected to do something in pursuance of an Act of Parliament or public duty or authority it must be brought within six months next after the act or neglect complained of. The provisions of the two Acts can be read together perfectly well—s. 7 of the Act of 1623 conferring special rights on infants while the Act of 1893 has done no more than say that as regards a particular sort of defendant the action must be commenced within six months. That is the view I should take of this legislation quite apart from authority, but if authority is needed in its support it will be found in the decision of the Court of Appeal which was cited in the very careful argument for the appellants—namely, *The Danube II.* (1), although it is true that in that case there was a difference in regard to the date. After the Public Authorities Protection Act, 1893, there was passed the Maritime Conventions Act, 1911, s. 8 of which provided that " no action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel . . . . unless proceedings therein are commenced within two years from the

(1) [1921] P. 183.

date when the damage or loss or injury was caused." In the Public Authorities Protection Act, 1893, assuming that statute to be applicable, the time was limited to six months, and it was argued that the limitation period of six months no longer prevailed in proceedings under the Maritime Conventions Act, 1911, even where the ship in question belonged to a public authority, in that case the Crown. That contention did not commend itself to the Court of Appeal. Lord Sterndale M.R., referring to s. 8 of the Act of 1911, said (1): "It does not seem to me that, even assuming this Act to apply as against the Crown, that section is in any way inconsistent with the Public Authorities Protection Act. There may very well co-exist a general limitation of all actions in respect of maritime damage to two years, and a further limitation where the action is brought against persons of a specific class to six months in the case of those persons. I see nothing inconsistent in the two Acts." In the same case Scrutton L.J. said (2): "In this case, the later Act has a general provision, applicable to all sorts of people, of a two years' limitation; and there was the prior Act, with a special provision applicable to public authorities only, of six months' limitation. I see no reason why the two should not stand together, and I see no plain words in the second Act showing that Parliament intended to repeal the first Act." Those observations are very cogent in the present cases, for, as I have said, the Public Authorities Protection Act, 1893, can well co-exist with the Limitation Act, 1623, with the result that although the rights of infants against ordinary defendants are safeguarded by s. 7, there is in the later statute a provision safeguarding public authorities. The judgment of Roche J. was in my opinion correct, and consequently this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Courts & Co.*
Solicitor for respondents: *Howard Roberts.*

(1) [1921] P. 187, 188.

(2) [1921] P. 189.

J. S. H.

Applied. CORFIELD *v.* GROVES. [1950]
1 All E.R. 488.

MONK *v.* WARBEY AND OTHERS.

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[1932. M. 4100.]

Insurance—Motor car—Third party risks—Insured owner lending car to uninsured person—Accident while car driven by uninsured person—Owner's liability to injured third party—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35.

The owner of a motor car who, in contravention of s. 35, sub-s. 1, of the Road Traffic Act, 1930, permits his car to be used by a person who is not insured against third party risks, is liable in damages to a third party who has been injured by the negligent driving of the uninsured person. In such a case the object and purview of the Act show that the penalties prescribed by s. 35, sub-s. 2, were not intended to be the sole remedy for a breach of the owner's statutory duty.

Where a person uninsured against third party risks is permitted by the owner to use a car, and injury is caused by his negligent driving to a third party, the latter may, where the uninsured person is without means, sue the owner of the car directly for damages for breach of his statutory duty and need not first sue the uninsured person.

Decision of Charles J. affirmed.

APPEAL from Charles J.

The plaintiff claimed damages for personal injuries sustained by him as the result of a collision between a motor coach driven by him and a motor car belonging to the defendant Warbey. The motor car had been lent by Warbey to the defendant Knowles on whose behalf it was being driven at the material time by the defendant May, and, as the plaintiff alleged, being driven negligently. Warbey, the owner of the car, was insured against third party risks, but neither Knowles nor May was insured against those risks. The plaintiff alleged that the defendant Warbey by permitting the car to be used by Knowles and May, when no policy of insurance was in force in relation to such user, committed a breach of the duty imposed by s. 35 of the Road Traffic Act, 1930. (1) The

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(1) Road Traffic Act, 1930, s. 35: " (1) Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of

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plaintiff further alleged that neither Knowles nor May was possessed of any means with which to pay any sum in respect of the damage sustained by the plaintiff. Interlocutory judgments were signed against Knowles and May, and the case went to trial on the defences raised by Warbey, which were that the statement of claim disclosed no cause of action, that the damages were too remote in point of law, and that the damages alleged had not yet accrued.

Charles J. in his judgment said that three points had been taken on behalf of the defendant Warbey, (1.) that the action against him being based upon the alleged breach of a statutory duty was not such a breach as gave a cause of action to an injured member of the public; (2.) that in any event the damage was too remote in law; and (3.) that the action against Warbey was premature in that he could not be joined with Knowles and May until the rights, if any, against them had been exhausted. With these contentions he could not agree. The purpose of the Road Act, 1930, was to protect third persons against risk, and the Act could not be read as limiting the remedy for a breach of the provisions of s. 35 to the penalty of fine or imprisonment there set out. Nor could he say that the damage was too remote, nor that it was premature to include Warbey in the action, seeing that neither Knowles nor May, whose negligence caused this collision and

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insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.

"(2) If a person acts in contravention of this section, he shall be liable to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment, and a person convicted of an offence under this section shall (unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification) be disqualified for holding or obtaining a licence under Part I of this Act for a period of twelve months from the date of the conviction.

. . . .

"(4) This section shall not apply to a vehicle owned by . . . . a person who has deposited and keeps deposited with the Accountant-General of the Supreme Court for and on behalf of the Supreme Court the sum of fifteen thousand pounds, at any time when the vehicle is being driven by the owner or by a servant of the owner in the course of his employment, or is otherwise subject to the control of the owner."

against whom interlocutory judgments had been signed, was in a position to pay damages. He accordingly gave judgment for the plaintiff against Warbey for 70*l.*

The defendant Warbey appealed.

Monier-Williams (*Schapiro* with him) for the appellant. First, a breach of the obligation created by s. 35 of the Road Traffic Act, 1930, does not give a cause of action to a member of the public who says he has been injured by that breach. The penalties provided by sub-s. 2 of the section are the only remedies available for such a breach—fine and/or imprisonment of the offenders and disqualification for holding or obtaining a licence. In *Phillips* v. *Britannia Hygienic Laundry Co.* (1) Bankes L.J. pointed out that where a person has been injured by the breach of a statutory obligation and the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the obligation follows as an incident; but where a specific remedy is given by the statute that remedy can alone be followed. In that case the Court held that an action would not lie for a breach of art. II, cl. 6, of the Motor Cars (Use & Construction) Order, 1904, inasmuch as the duty imposed by the Order was a public duty only to be enforced by the penalty imposed for its breach. That applies exactly to the present case.

[GREER L.J. That appears to be a somewhat narrow view. I prefer that expressed by Atkin L.J. in the same case where he said (2): " One question to be considered is, Does the Act contain reference to a remedy for breach of it? Prima facie if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals." It must be borne in mind that the Road Traffic Act, 1930, follows upon the Third Parties (Rights against Insurers) Act, 1930, which gave rights to injured persons to the benefit of insurance moneys.]

The Road Traffic Act, 1930, is a new departure in legislation,

(1) [1923] 2 K. B. 832.

(2) [1923] 2 K. B. 841.

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and if it had been intended to give a cause of action in respect of a failure to comply with the requirements of s. 35 it would have been easy to say so in terms. The Act has not said so; it has merely provided penalties for non-compliance with its terms, and the severity of those penalties clearly indicates that the Legislature intended them to be the sole remedy for a breach. In *Groves* v. *Lord Wimborne* (1) the obligation to fence dangerous machinery there in question was for the benefit of a certain class (of which class the plaintiff was one) and not for the benefit of the public generally. The decision in that case therefore has no application to the present case. In *David* v. *Britannic Merthyr Coal Co.* (2) Fletcher Moulton L.J. said that it was " settled law that where damage has accrued to any person through the breach of a statutory duty by another person the latter is liable." That proposition is much too wide, and it is significant that when the case went to the House of Lords (3) Lord Halsbury said: " Though I am agreeing with the conclusion arrived at by the majority of the Court of Appeal, I am by no means prepared to adopt the reasoning by which that conclusion is arrived at. Indeed it is not too much to say that I dissent from some of the propositions involved in that judgment."

[*Couch* v. *Steel* (4) and *Gorris* v. *Scott* (5) were also referred to on this point.]

Secondly, the damage is too remote. The act of a third party intervened and broke the chain of causation.

Thirdly, the action against Warbey was premature. To support the action the damage alleged must be in existence when the writ is issued. The plaintiff must first establish his cause of action against Knowles and May and show their inability to pay before he can commence his action against Warbey. In other words the plaintiff's action against Warbey must be (1.) for a quantified sum which could only be arrived at after judgment had been obtained against Knowles and

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(1) [1898] 2 Q. B. 402.
(2) [1909] 2 K. B. 146, 157.
(3) [1910] A. C. 74, 76.
(4) (1854) 3 E. & B. 402.
(5) (1874) L. R. 9 Ex. 125.

May, and (2.) it was shown that neither of these defendants was able to satisfy it.

Comyns Carr K.C. and *G. H. Oliver* for the respondent were not called upon.

GREER L.J. This appeal raises several questions of considerable public importance, and though I might be content to say that I have read and agree with every word of Charles J.'s judgment, I propose, having regard to the fact that other cases may be affected, to state my view in my own words.

The appellant, Warbey, was the owner of a motor car in respect of which he had a Lloyd's policy covering damage caused by its use, but it was conceded that the policy did not cover the events which happened. The action was brought against Warbey alleging a breach by him of the statutory obligation imposed by s. 35 of the Road Traffic Act, 1930, and damage ensuing as the result of that breach.

On behalf of the appellant, Mr. Monier-Williams has taken three points, first, that the judge was wrong in deciding that a breach of s. 35 was available for the benefit of the plaintiff. That contention is founded on the fact that very serious penalties are imposed for a breach of the section, and therefore that it cannot be supposed that the section was intended to create a right in a member of the public who was injured by reason of the breach. In my judgment this is a stronger case in favour of the plaintiff than *Groves* v. *Lord Wimborne* (1), and the cases relating to a breach of statutory duty towards miners, such as *Britannic Merthyr Coal Co.* v. *David.* (2)

The Road Traffic Act, 1930, under which the question arises, was passed in these circumstances: it had become apparent that people who were injured by the negligent driving of motor cars were in a parlous situation if the negligent person was unable to pay damages. Accordingly two statutes were passed, one for the purpose of enabling persons who were thus injured to recover, in the case of the bankruptcy of an insured defendant the money which would be payable to him by the insurance company. Parliament

(1) [1898] 2 Q. B. 402.

(2) [1910] A. C. 74.

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enacted that in such circumstances the insurance money should go not to the general creditors of the bankrupt defendant but to the injured person; in other words the injured person, although not a party to the insurance could make the insurance company liable. That Act—the Third Parties (Rights against Insurers) Act, 1930, did not meet the whole difficulty that had arisen because motor car owners sometimes lent their cars to uninsured persons, and if a person who borrowed a car and in driving it caused injury to a third person the remedy provided by that Act did not avail the injured person. Consequently the Road Traffic Act, 1930, was passed for the very purpose of making provision for third parties who suffered injury by the negligent driving of motor vehicles by uninsured persons to whom the insured owner had lent such vehicles. How could Parliament make provision for their protection from such risks if it did not enable an injured third person to recover for a breach of s. 35? That section which is in Part II. of the Act headed "Provision against third-party risks arising out of the use of motor vehicles," would indeed be no protection to a person injured by the negligence of an uninsured person to whom a car had been lent by the insured owner, if no civil remedy were available for a breach of the section. The Act requires every person who runs a car to have an insurance on the use of the car, and to provide himself with a certificate stating the terms of the insurance. Sect. 35, sub-s. 1, says that "subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act." There is no dispute that the appellant committed a breach of the section, but it is argued that taking the Act as a whole it is clear that it was not intended to confer a right upon an injured third person to claim damages for such a breach. It seems to me that the situation is exactly within the language of A. L. Smith L.J. in *Groves* v. *Lord Wimborne* (1), where he said (1): "The Act in question,"—the Factory & Workshop Act, 1878—"which followed numerous other Acts in pari materiâ, is not in the nature of a private legislative bargain between employers and workmen, as the learned judge seemed to think, but is a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit." The Lord Justice then said (2): "Could it be doubted that, if s. 5 stood alone, and no fine were provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted. That being so, unless it appears from the whole 'purview' of the Act, to use the language of Lord Cairns in the case of *Atkinson* v. *Newcastle Waterworks Co.* (3), that it was the intention of the Legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine imposed by s. 82, it follows that, upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established." The result of the above construction may be stated as follows: prima facie a person who has been injured by the breach of a statute has a right to recover damages from the person committing it unless it can be established by considering the whole of the Act that no such right was intended to be given. So far from that being shown in this case, the contrary is established. To prosecute for a penalty is no sufficient protection and is a poor consolation to the injured person though it affords a reason why persons should not commit a breach of the statute.

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(1) [1898] 2 Q. B. 402.

The only other case I propose to refer to is *Phillips* v. *Britannia Hygienic Laundry Co.* (4), but before citing a passage from it I desire to say first that it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. In this class of case it does not seem logical to say that unless you can

(1) [1898] 2 Q. B. 406.
(2) Ibid. 407.
(3) (1877) 2 Ex. D. 441.
(4) [1923] 2 K. B. 832.

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find in the Act provisions specifically intended for the benefit of an individual or described class of persons no action will lie for a breach of a statutory provision where penal consequences are imposed for its breach. I prefer the view expressed by Atkin L.J. in the case I have just cited where he said (1): "One question to be considered is, Does the Act contain reference to a remedy for breach of it. Prima facie if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves* v. *Lord Wimborne* (2) and *Britannic Merthyr Coal Co.* v. *David* (3). To my mind, and in this respect I differ from McCardie J., the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public." What therefore has to be considered here is, taking the whole of this Act, is there anything in it to show that an injured person is outside its scope? I am satisfied that there is not; and a person who suffers injury by reason of a breach of s. 35 can maintain an action for that breach.

A further point taken on behalf of the appellant was that the damage is too remote. Assuming that a right of action is given by the Act to a person injured by a breach of a statutory duty, it seems to me that the damages in this case flow directly from that breach. The plaintiff had two defendants who were not in a position to pay those damages and who were uninsured and against whom therefore he had no right under the Third Parties (Rights against Insurers) Act, 1930, to stand in their shoes. That is the very contingency in respect of which the plaintiff was intended to be protected. The point therefore fails.

The third point taken was that in any event the action against the appellant Warbey is premature. That involves the question whether the quantification of the damage is an essential part of the cause of action. I think it is not. The cause of action is that the statute has been broken and that damage has been caused to the plaintiff. All that has to be shown is that the person primarily liable is in such a financial position that nothing is obtainable from him, and that nothing can be effected by bankruptcy proceedings against him, as, being an uninsured person, there can be no recourse against an insurance company. Here the damage had accrued at the date of the writ; neither Knowles nor May had any money wherewith to pay damages; it was the fact that proceedings in bankruptcy would have been useless; and in those circumstances the plaintiff might have brought his action without joining Knowles and May. This point, like the others, fails and for the reasons I have given the appeal must be dismissed.

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(1) [1923] 2 K. B. 841.
(2) [1898] 2 Q. B. 402.
(3) [1910] A. C. 74.

MAUGHAM L.J. On one of the points raised in this appeal there is a good deal to be said, and it is only after some hesitation that I arrive at the same conclusion as Greer L.J. The point I refer to is whether on the true construction of the Road Traffic Act, an action may properly be brought by a third party for damages caused by a breach of the statutory obligation imposed by s. 35 upon the owner of a motor car in the somewhat unusual circumstances of this case. On that point I propose to add a few observations.

The facts are simple. Warbey was the owner of a motor car in respect of which he was insured as required by the statute against (inter alia) the probability of third party risks when he himself or a member of his family was driving; but admittedly he was not insured against third party risks if some uninsured person was permitted by him to drive the car. Out of the kindness of his heart, Warbey lent his car to the defendant Knowles. Knowles told Warbey that the third defendant May would drive the car and to that Warbey made no objection. Probably Warbey was unaware that neither Knowles nor May was insured against third party risks, and

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it does not appear that he made any enquiry on the subject. Unfortunately, the car being driven by May when neither he nor Knowles was insured against third party risks, this involved a breach of s. 35, and as damage resulted to the plaintiff, the latter brought his action in respect of the breach of the duty created by s. 35. The authorities which have been cited in the able argument for the appellant show that prima facie the rule is that where there is a breach of a statutory duty resulting in damage to an individual an action for damages will lie. This prima facie rule, however, is subject to exceptions. In particular, where the statute gives a special remedy for a breach of the duty it creates, the special remedy may be the only one available. In such a case, therefore, a person who has been injured by the breach of the duty has no right of action for damages. The statute we are considering provides by s. 35, sub-s. 2, for the possibility of a fine and imprisonment imposed upon a person contravening sub-s. 1, and for the possibility of his disqualification for holding or obtaining a licence. At various times doubts have arisen as to the circumstances which will enable the Court to determine whether or not in any particular case there can be a remedy other than or in addition to the special remedy provided by the Act. The intention of the Legislature is to be gathered from the particular Act under consideration, and I doubt whether anything more lucid can be found on the subject than in the passage in Lord Cairns' judgment in *Atkinson* v. *Newcastle &c. Waterworks Co.* (1) I think, however, one may say this that if the Act provides a special remedy for a contravention of its provisions the prima facie rule is that that is the only remedy, and the question whether that rule applies in any particular case depends upon the purview of the legislation and the language employed. The Court has sometimes resolved that question in one way and sometimes in another. In *Phillips* v. *Britannia Hygienic Laundry Co.* (2) this Court held that it was not intended by the Order there in question that every one who might be injured by its breach should have a right

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(1) 2 Ex. D. 441.

(2) [1923] 2 K. B. 832, 841.

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of action for damages. Like Greer L.J. I think that the principle stated by Atkin L.J. in that case was correct and that the question whether the Act or Order is intended to give or to exclude a private remedy as the Lord Justice said, "is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public." The strongest case on the other side is *Groves* v. *Lord Wimborne.* (1) The cases show that there are certain considerations for determining whether the intention of the statute is to preclude private remedy. First, the Court has to make up its mind whether the harm sought to be remedied by the statute is one of the kind which the statute was intended to prevent; in other words, it is not sufficient to say that harm has been caused to a person and to assert that the harm is due to a breach of the statute which has resulted in injury. A good instance of that is to be found in *Gorris* v. *Scott* (2), where sheep were washed overboard by reason of the defendant's neglect to take a precaution required by an Order of the Privy Council made under the authority of an Act. The Court took the view that the object of the Act and the Order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiff could not recover. The second consideration which strongly tends to support the view that this statute was not intended to preclude a civil action is that it is brought by a person pointed out on a fair construction of the Act as being one whom the Legislature desired to protect. That kind of consideration affected this Court in *Groves* v. *Lord Wimborne.* (1)

On the whole, therefore, I have come to the conclusion that in this case there is nothing in the Act to show that a personal action is precluded by reason of the existence of the special remedy provided for a breach; and further that there is sufficient ground for coming to the conclusion that s. 35 was passed for the purpose of giving a remedy to third

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(1) [1898] 2 Q. B. 402.

(2) L. R. 9 Ex. 125.

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persons who might suffer injury by the negligence of the impecunious driver of a car. It is true to say that it is only if there is negligence in the driving of the car that the third party is given a right, but I cannot help thinking that when the Act was passed it was within the knowledge of the Legislature that negligence in the driving of cars was so common an occurrence with the likelihood of injury to third persons that it was necessary in the public interest to provide machinery whereby those third persons might recover damages. Sub-s. 4 of s. 35 also tends strongly in favour of the view that civil rights were being considered by the Legislature, that sub-section indicating that a person who has deposited a sum of 15,000*l.* is not legally bound to take out a policy of insurance which will protect third parties. A personal right of action for a breach of s. 35 therefore in my opinion lies and it lies on the assumption that the policy of insurance was one which would give a third party some measure of indemnity in the event of the person using the car being guilty of negligence. Incidentally this also disposes of the point as to remoteness of damage. With regard to the other point I have nothing to add.

ROCHE L.J. Notwithstanding the able argument of Mr. Monier-Williams I am clearly of opinion that the judgment of Charles J. was right and should be affirmed. I desire to add that I also am not uninfluenced by sub-s. 4 of s. 35, which seems to point to the conclusion that it was within the purview of the Act to render effective civil remedies for the mischiefs being dealt with in the section and that it was not intended to exclude a person who suffered damage through a breach of a statutory duty from his civil remedy merely because penalties of a criminal nature are imposed.

Appeal dismissed.

Solicitors for appellant: *Clifford-Turner, Hopton & Lawrence.*

Solicitors for respondent: *Pattinson & Brewer.*

J. S. H.

iscussed. HOFFMANN
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[1934. R. No. 353.]

Landlord and Tenant—Lease—Forfeiture—Breach of Covenant not to use Premises for illegal or immoral purposes—Notice to quit—Negative Covenant—Breach incapable of remedy—Omission to require Breach to be remedied—Omission to require Compensation in Money—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-s.* 1 (*b*) (*c*).

The defendant lessee committed a breach of her covenant not to use the premises for illegal or immoral purposes. Notice to quit served on her in consequence did not require her to remedy the breach nor to make compensation in money under s. 146, sub-s. 1 (*b*) (*c*), of the Law of Property Act, 1925 :—

Held, (1.) that ceasing to commit the breach was no remedy; (2.) that the breach was not capable of remedy, and that, consequently, omission to require it to be remedied did not invalidate the notice; and (3.) that the notice was not invalidated by the omission to require payment of compensation in money although the breach was incapable of remedy, because if the landlords did not require compensation they need not ask for it.

Semble, there may be negative covenants the breach of which is capable of remedy.

Decision of MacKinnon J. [1934] 1 K. B. 695 affirmed.

APPEAL from a decision of MacKinnon J. under Order XIV., r. 8 (*b*).

The plaintiffs, the Governing Body of Rugby School, were the owners of certain premises, 14 Great Ormond Street, in the county of London. By a lease dated November 11, 1931, they let the said premises to one Arthur Reason from June 24, 1932, to June 24, 1939, at a rent of 110*l.* per annum. Under a licence from the plaintiffs dated November 28, 1932, Reason assigned the said lease to the defendant, Marian Hannah Cecilia Tannahill. The said lease contained a covenant by the lessee and his assigns not to permit the said premises to be used for any illegal or immoral purpose. By the lease, s. 146 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), was made applicable to all notices. On January 13, 1934, the defendant was convicted of permitting the said premises to be used for habitual prostitution contrary to s. 13 of the Criminal Law

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Amendment Act, 1885 (48 & 49 Vict. c. 69), and was fined 10*l.* and ordered to pay fifteen guineas costs. By a notice dated January 25, 1934, addressed to the defendant, the plaintiffs' solicitors gave the following notice to the defendant: "We hereby give you notice, pursuant to section 146 of the Law of Property Act, 1925, that you have broken the covenant contained in the said lease not to permit the said premises to be used for any illegal or immoral purpose in that you have knowingly permitted the said premises or part thereof to be used for the purposes of habitual prostitution. And in the exercise of the right of re-entry conferred upon them by the said lease for (amongst other things) a breach of the said covenant, we hereby on behalf of your said landlords require you to quit and deliver up the said premises." Since the date of the said conviction the defendant had not used the premises for any immoral or illegal purpose, and had evicted all her sub-tenants complained of, and all her present tenants were of unimpeachable character. She stated in her affidavit in opposition to summary judgment that she was prepared to undertake to the Court that she would in the future take every care in the choice of her tenants. She stated that she had paid 850*l.* on the assignment to her of the said lease of which 500*l.* was agreed as the value of the lease.

By the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 146, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—(*a*) specifying the particular breach complained of; and (*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (*c*) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

It was contended by the defendant that the notice to quit was bad in that it did not require the defendant to remedy the breach under sub-s. 1 (*b*) above set out, and also in that it did not require the defendant to make compensation in money under sub-s. 1 (*c*).

MacKinnon J. gave judgment for the plaintiffs, holding that the breach of covenant complained of was not capable of remedy and that the notice to quit was a valid notice.

The defendant appealed.

Fearnley-Whittingstall for the appellant. MacKinnon J. was wrong in holding the notice to quit to be a valid notice within s. 146 of the Law of Property Act, 1925. He decided that there is a radical distinction between an affirmative and a negative covenant, and that with regard to the latter, if a breach is committed, it cannot be remedied. That cannot be correct. For example, a lessee may covenant not to use the demised premises as a school. If he uses them for that purpose he commits a breach of the covenant, but if he ceases to use them as a school he remedies that particular breach. So in this case the breach was remedied when the appellant ceased to use them for the purpose complained of. In the Irish case of *Walsh* v. *Wightman* (1) Andrews L.J. pointed out that the policy of the law in modern times has been against the enforcement of forfeitures when the breach relied upon can be remedied, pecuniary compensation awarded, and adequate undertaking given to prevent a recurrence of the breach. That language applies to the present case. The decision in *Lock* v. *Pearce* (2), which was relied upon for the respondents before MacKinnon J., merely decided that where the breach is capable of remedy the landlord need not demand compensation; it is no authority for saying that where the breach is not capable of remedy, as was contended by the respondents, the notice need not ask for compensation. The section must be, and has not been, strictly complied with, and therefore the respondents were not entitled to maintain their action.

H. I. P. Hallett for the respondents was not called upon.

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(1) [1927] N. I. 1.

(2) [1893] 2 Ch. 271.

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GREER L.J. In this case judgment was given in favour of the plaintiffs for possession of certain premises. The defendant appeals, and has had the advantage of having her case presented by Mr. Fearnley-Whittingstall as well as it could possibly have been put. The question depends upon whether or not the notice which was served upon her by the plaintiffs sufficiently complies with the requirements of s. 146, sub-s. 1, of the Law of Property Act, 1925, the section which has taken the place of s. 14 of the Conveyancing Act, 1881.

The material facts are that, some time before the notice was served, the defendant had been knowingly and actively permitting the house to be used as a brothel, and I have little doubt she had been receiving profits in respect of this immoral business. The covenant, the breach of which is complained of, expressly forbids the tenant to permit the premises to be used for such a purpose. [The Lord Justice referred to the evidence given establishing the unlawful user of the premises and breach of the covenant, and continued :] In those circumstances the plaintiffs were entitled to obtain possession of the premises unless they failed to comply with the terms of s. 146 of the Law of Property Act, 1925. It is conceded that in the notice given by the plaintiffs the defendant was not required to remedy the breach, nor was she required to make compensation in money in respect thereof. Mr. Fearnley-Whittingstall contends that in view of these omissions the proceedings to recover possession fail ab initio.

The first point is, whether this particular breach is capable of remedy. In my judgment MacKinnon J. was right in coming to the conclusion that it was not. I think perhaps he went further than was really necessary for the decision of this case in holding that a breach of any negative covenant—the doing of that which is forbidden—can never be capable of remedy. It is unnecessary to decide the point on this appeal; but in some cases where the immediate ceasing of that which is complained of, together with an undertaking against any further breach, it might be said that the breach was capable of remedy. This particular breach, however—conducting the premises, or permitting them to be conducted,

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as a house of ill-fame—is one which in my judgment was not remedied by merely stopping this user. I cannot conceive how a breach of this kind can be remedied. The result of committing the breach would be known all over the neighbourhood and seriously affect the value of the premises. Even a money payment together with the cessation of the improper use of the house could not be a remedy. Taking the view as I do that this breach was incapable of remedy, it was unnecessary to require in the notice that the defendant should remedy the breach.

The further question is whether the absence of any statement in the notice requiring compensation in money in respect of the breach is fatal to the validity of the notice. As to that, the decision of the Court of Appeal in *Lock* v. *Pearce* (1) binds us to hold that the plaintiffs were under no obligation to require compensation in money. I can well understand that a body like the plaintiffs would be averse to touch money coming from a tenant in such circumstances. In any event, whatever might have been our view in the absence of authority, it is plain from the judgments in *Lock* v. *Pearce* (1) that the point is not open in this Court. Lindley L.J. there used these words (2): "Then, as regards the notices required by s. 14, sub-s. 1 [of the Conveyancing Act, 1881], the statute requires notice to be given specifying the breach complained of, as the first thing, and, if the breach is capable of remedy, requiring the lessee to remedy it, and 'in any case requiring the lessee to make compensation in money for the breach.' Supposing the lessor does not want compensation, is the notice to be held bad because he does not ask for it? There is no sense in that. The meaning is to be found by looking a little further on. The sub-section begins by saying that the right of re-entry or forfeiture shall not be enforceable unless proper notice is given and the lessee fails within a reasonable time afterwards to remedy the breach and to make reasonable compensation in money to the satisfaction of the lessor. The sense of that is that the lessor must tell the lessee what he wants done. The lessee is

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(1) [1893] 2 Ch. 271.

(2) [1893] 2 Ch. 279.

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entitled to know what his landlord complains of, and, if his landlord is entitled to compensation, whether he wants compensation." The Lord Justice there concluded his judgment in a paragraph of two sentences which are specially applicable to the present case; he said: "On these grounds I am of opinion that this appeal fails. Upon the merits as well as upon the technicalities, all the points are against the appellants." In the later case of *Civil Service Co-operative Society, Ld.* v. *McGrigor's Trustee* (1), Russell J. followed *Lock* v. *Pearce* (2) as applicable to a case like this where the breach was incapable of remedy. The appeal must be dismissed.

MAUGHAM L.J. I am of the same opinion, and would add nothing but for the fact that I am not prepared to go as far as MacKinnon J. in his reasons for holding that the notice given to the defendant was valid. The learned judge thought that the breach of a negative covenant was incapable of remedy. I am not satisfied that there may not be some negative covenants with regard to which a breach may be capable of remedy so that as to them a proper notice under s. 146 ought to require the lessee to remedy the breach. My ground for affirming the decision appealed from rests upon a somewhat narrower basis. I ask myself, first, what is the object of s. 146, which reproduces s. 14 of the Conveyancing Act, 1881? There are many authorities on the subject, such as *Fletcher* v. *Nokes* (3) and *Fox* v. *Jolly*. (4) In the latter case Lord Buckmaster said, quoting with approval the language of North J. in *Fletcher* v. *Nokes* (3): "I think that s. 14 was intended to place the tenant in a better position than he was in before. He was to have the option of doing, before action brought, all those things the neglect of which would have been the ground of relief against him if s. 14 had not been passed." That section has always been construed, having regard to the common sense of the matter, that the tenant is to be given reasonable information as to what he is required to do, and he is given the right to apply to the Court for relief. The lessor has no right of action unless he complies with the provisions of the section. It was because of this common-sense interpretation which had to be given to s. 14 of the Act of 1881 that the Court of Appeal in *Lock* v. *Pearce* (1) came to the conclusion that, although its language pointed in the opposite direction, the section did not mean that the lessor should require the lessee to make compensation if he did not want it. That view was followed by Russell J. in *Civil Service Co-operative Society, Ld.* v. *McGrigor's Trustee* (2) and it had the approval of Lord Buckmaster in *Fox* v. *Jolly* (3). A reasonable construction has thus been put upon the section, the object being to allow the lessee to remedy the breach or to make compensation before action is brought against him. From that two things seem to me to follow: first, the remedy which is spoken of in the section must be a complete remedy. A partial remedy is not within the section, the concluding words of sub-s. 1 being: "and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." The second thing to be gathered from the section is that the breach must be capable of remedy within a reasonable time. The lessor is not to be kept out of his right of action for an unreasonable time. If, for example, the breach is of such a character that many months or perhaps years must elapse before the breach can be remedied to the satisfaction of the lessor, such a case would not be as regards remedy within the section at all. The importance of that in this case is that merely ceasing to use the premises for an illegal or immoral purpose is not in any true sense to remedy the breach. The phrase in the covenant is of course negative; it is not to permit the premises to be used for an illegal or immoral purpose. In a sense the lessee ceases to permit the premises to be used for such a purpose if during a week she complies with the covenant; but that is not sufficient to establish that in the particular case the breach is capable of remedy. The use of

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(1) [1923] 2 Ch. 347.

(2) [1893] 2 Ch. 271.

(3) [1897] 1 Ch. 271.

(4) [1916] 1 A. C. 1, 13.

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(1) [1893] 2 Ch. 271.

(2) [1923] 2 Ch. 347.

(3) [1916] 1 A. C. 1.

C. A.
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the premises for a long period for an immoral purpose seriously tends to damage their value and to give them a bad name, as indeed is shown by the common designation of such premises—namely, a house of ill-fame; and merely ceasing for a reasonable time, perhaps a few weeks or a month, to use the premises for an immoral purpose would be no remedy for the breach of covenant which had been committed over a long period. This breach, in my opinion, was not capable of remedy within a reasonable time, and therefore the lessors were under no obligation to say anything in their notice requiring the lessee to remedy it.

ROCHE L.J. I agree that the appeal should be dismissed for the reasons that have been given.

Appeal dismissed.

Solicitors for appellant: *Solomon, Staddon & Barnes.*
Solicitors for respondents: *Iliffe, Sweet & Co.*

J. S. H.

1934
March 16, 19.

ATTORNEY-GENERAL *v.* LLEWELYN.

Revenue—Estate Duty—Settled Property—Life Estate in capital moneys vested in deceased—Deed of Exchange—Conveyance of Life Estate to remainderman for value—Death of deceased within three years—Liability to Duty—" Property passing . . . . by reason only of a bona fide purchase . . . . "—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 3, *sub-s.* 1—*Finance Act,* 1900 (63 *Vict. c.* 7), *s.* 11—*Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 59, *sub-s.* 1.

The deceased, under a settlement, was entitled to certain lands and capital moneys for life with remainder to the defendant. By a deed of exchange made between the deceased and the defendant the defendant conveyed to the deceased his remainder in the above lands, and in return the deceased conveyed to the defendant his life interest in the capital moneys to the intent that the life interest should merge in the defendant's estate in remainder. Deceased died within three years. The Crown claimed estate duty on these moneys.

By s. 3 sub-s. 1, of the Finance Act, 1894: " Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes . . . . " :—

Held, that the property, the life interest, did not pass by reason of the purchase, because that interest ceased on death, and consequently, s. 3 sub-s. 1, of the Act of 1894 did not apply, and that, the deceased having died within three years of the making of the deed, s. 11 of the Finance Act, 1900, as amended, applied, and the property was deemed to pass notwithstanding its disposition by the above deed.

INFORMATION filed on behalf of the Crown by the Attorney-General.

The object of the information was to recover estate duty claimed upon the death of Sir John Talbot Dillwyn Llewelyn, Bt. (hereinafter called "the deceased") in respect of the property below mentioned as property deemed to pass on such death under s. 11 of the Finance Act, 1900 (1), as amended by s. 59 sub-s. 1 of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8).

Immediately prior to the execution of the deed of exchange next mentioned certain lands in Glamorgan and Brecon and elsewhere and certain capital moneys (hereinafter together called "the Llewelyn Settled Estates") stood limited to the use of the deceased during his life with remainder to the defendant, the present baronet, Sir Charles Leyshon Dillwyn

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 3 sub-s. 1: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes . . . . where such purchase was made . . . . for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit. . . . ."

Finance Act, 1900 (63 Vict. c. 7), s. 11 sub-s. 1: "In the case of every person dying after March 31, 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was bona fide made or effected [three years (s. 59, sub-s. 1, of the Finance (1909–10) Act, 1910)] before the death of the deceased . . . ."

Venables Llewelyn, in fee simple. By a deed of exchange dated December 29, 1925, and made between the deceased of the one part and the defendant of the other part, the defendant conveyed to the deceased his estate in remainder in the lands specified in the schedules to the said deed (being a part of the Llewelyn Settled Estates) to the intent that the life estate therein of the deceased should merge in the said estate in remainder and that the deceased should become entitled to the said lands in fee simple in possession, and the deceased conveyed to the defendant his life interest in the residue of the Llewelyn Settled Estates to the intent that such life interest should merge in the defendant's estate in remainder, and that the defendant should become entitled to the said residue in fee simple in possession.

The deceased died on July 6, 1927, being less than three years after the date of the said deed of exchange. In the circumstances aforesaid estate duty at the appropriate rate became payable upon the death of the deceased under s. 11 of the Finance Act, 1900 (1), as amended by s. 59 sub-s. 1, of the Finance (1909–10) Act, 1910, in respect of the said residue of the Llewelyn Settled Estates as being property deemed to pass on such death. The aggregate value of the property which passed on the death of the deceased, exclusive of the said residue (the value of which was unknown to the informant), was upwards of 112,780*l.*, and the appropriate rate of duty was therefore 20 per cent. or upwards.

The defendant, as the person to whom the life interest of the deceased in the said residue was surrendered under the said deed of exchange, was the person accountable for the said duty. The Commissioners of Inland Revenue had caused application to be made to the defendant for an account and payment of the said duty, but the defendant refused to deliver any such account and contended that no duty was payable.

The informant on behalf of His Majesty prayed as follows: (1.) That it might be declared that upon the death of the deceased duty at the appropriate rate became payable in respect of the said residue under s. 11 of the Finance Act,

(1) Ante, p. 95, note (1).

1900, as amended. (2.) That the defendant might be ordered to deliver an account of and to pay the said duty, with interest thereon from the death of the deceased, penalties being waived.

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v.
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Sir D. B. Somervell S.-G. and *J. H. Stamp* for the informant.

Norman Daynes K.C. and *Andrewes-Uthwatt* for the defendant.

FINLAY J. This case relates to a difficult and complicated subject-matter and it has been very elaborately argued. I am of opinion that the claim of the Crown is made out, and it is proper that I should state, though at no very great length, the view which I have formed. I shall hope, in doing so, to indicate sufficiently why I find it impossible to accept the argument for the defendant.

The matter arises on an information by the Attorney-General claiming duty in respect of property deemed to pass on death under s. 11 of the Finance Act, 1900. The facts, which as usual in these cases are not in dispute, are set out in various paragraphs of the information. The position was, that before the making of a deed of exchange, to which it is necessary to make reference, lands in Glamorgan and Brecon and elsewhere and moneys stood limited to the use of the deceased, Sir John Llewelyn, Bt., for life with remainder to the defendant, Sir Charles Llewelyn, the present baronet, in fee simple. In those circumstances there was a deed of exchange dated December 29, 1925. At that time the deceased was a very old gentleman of 85 or 86, and in fact he lived for rather over two years but less than three years after the date of this exchange. The exchange was made between the deceased of the one part, and the defendant of the other part, and by it the defendant conveyed to the deceased his estate in remainder in certain lands which were set out in the schedule, the intention being that the life estate of the deceased should merge in the estate in remainder, and that the deceased should become entitled to the said lands in fee simple in possession. In return for that the deceased conveyed to the defendant his life interest in the residue of the Llewelyn settled estates to the intent that such life interest should merge in the defendant's estate in remainder and that the defendant should become entitled to the said residue in fee simple in possession; and my attention was called to the precise terms of the deed, which are that this property was given to hold the same unto Colonel Llewelyn—that is the defendant—for the residue of the life of the deceased without impeachment of waste, to the intent that the same might coalesce with and merge in the estate of the defendant. It is important to observe that what is there sold is the life interest of the deceased. The result, of course, of what was done is perfectly clear. It was that, whereas the deceased had before this the whole life interest and the defendant had the whole remainder, the estate was split up afterwards so that there was a division effected between the two. That is the result and there is no difficulty at all in understanding it.

Now the question which arises is as to the effect of that upon estate duty, and the case for the Crown is that this is a perfectly simple case within s. 11 of the Finance Act, 1900 (1). It is not necessary that I should consider previous cases which have arisen, cases which no doubt resulted in defeating to a substantial extent that which one can only assume was the intention of the Legislature. Those cases are *Attorney-General* v. *Beech* (2) and particularly *Attorney-General* v. *De Préville* (3). In consequence of those decisions, and particularly in consequence of the latter, s. 11 was enacted, and it was said on behalf of the Crown that it plainly covers the present case. It reads as follows: [His Lordship read the section (1).]

The argument for the Crown is that this section clearly governs the present case and it is pointed out that the section expressly uses the words "whether for value or not." That it is said shows that the fact that there was consideration for the surrender here does not affect the case. The argument on the other side, elaborately as it was developed, can I think be put quite concisely. It was said: It is true that this

(1) Ante, p. 95, note (1).

(2) [1899] A. C. 53.

(3) [1900] 1 Q. B. 223.

section hits the case in this sense, that it brings it within the operation of s. 1 (which created the duty) and s. 2 of the principal Act, the Finance Act, 1894 (57 & 58 Vict. c. 30). The effect, it is said, of s. 11 of the Act of 1900 is, in substance, to add a new sub-section to s. 2 of the Act of 1894. Sect. 2 of the Act of 1894 is, of course, the much-discussed section which says that various things are to be deemed to pass on the death of the deceased. Then it is said, having in that way got into the Act of 1894, this being for consideration is taken out of it by s. 3 sub-s. 1 of that Act (1).

That is really the substance of the argument, and it depends upon taking a correct view of the effect of that sub-section upon the present case, because that s. 11 of the Act of 1900 applies to the present case appears to be quite clear and, indeed, was not questioned. What was said was that no doubt s. 11 operated to bring the case into the Act, but that it was taken out by s. 3 sub-s. 1. Various cases were cited to me upon that aspect of the matter. I do not think that they have really any very direct bearing upon it. *Attorney-General* v. *Boden* (2) seems to me to be remote from the present case, and *Attorney-General* v. *Earl of Sandwich* (3), which relates to the determination of an annuity, seems to me to go on a different point altogether. The same thing I think applies to a case which was cited with reference to s. 3 sub-s. 2 of the Act of 1894, a case of partial consideration, *Attorney-General* v. *Hawkins* (4). These cases do not seem to me really to help upon the construction of the crucial thing, which is the construction of the words in this s. 3 sub-s. 1, of the Act of 1894 (1). Now it is necessary just to look at those words and to make up one's mind what they mean: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes." Now the property there passing on the death clearly refers to the whole property. I think that "by reason only of a bona fide purchase" must inevitably refer to the same thing. Here, if one looks at the facts, what one finds is that there was a purchase of nothing but the life interest, which could not possibly pass on the death. How can it therefore be said that there is a passing on the death by reason only of a bona fide purchase? So far was it from "by reason only of a bona fide purchase" that it was not really by reason of the purchase at all. It could not be because the purchase was the purchase only of the life interest which ceased on the death and could not pass on the death. Now if that is right it disposes of the case. I think that the argument for the defendant does rest, as was said by the Solicitor-General, upon a fallacy, which I think confuses the property for which value is given and the property deemed to pass on the death on which the duty is levied. Those, if the section is to apply, must be the same. Here they are utterly different. I do not think that it would be useful that I should say more about the case. As I said at the beginning, it was put by the Solicitor-General as being quite a plain case under s. 11, and such for a long time it appeared to me to be. But I was convinced by Mr. Daynes, that the effect of s. 3 upon s. 11 required close consideration. I have endeavoured to follow his argument and to show —I am afraid rather briefly and perhaps inadequately—why I cannot accept it. My view, therefore, remains what it was when the case was opened. I think this is a case to which s. 11 applies. I do not need to develop the reasons. I do not need to develop the points which were made as to the startling consequences in the way of escape from duty and so on which were suggested. One is not greatly concerned with these. What one is concerned with is the proper construction of the section, and on the proper construction in this case I think that s. 11 applies and that the Crown are entitled to succeed. There will therefore be judgment for the informant with costs.

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(1) Ante, p. 95, note (1).

(2) [1912] 1 K. B. 539.

(3) [1922] 2 K. B. 500.

(4) [1901] 1 K. B. 285.

Solicitor for informant: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Field, Roscoe & Co., for Collins, Woods & Vaughan Jones, Swansea.*

W. L. L. B.

PRUDENTIAL ASSURANCE COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1934
July 10.

Revenue—Stamp Duty—Policy of life assurance—Incorrect statement of age—Consequent correction by memorandum endorsed on policy—Increased sum assured thereby—New policy—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 1, 3 *sub-s.* 2, s. 91.

An industrial policy of life assurance for 12*l.* 8*s.* was granted to a person whose age therein was stated as 51 next birthday. Subsequently the assured informed the insuring company that she had wrongly stated her age, which was 49 next birthday. This alteration, on the company's tables, involved the payment of a larger sum on death. The company accordingly endorsed on the policy a memorandum that having received notice that "the age of the person whose life is assured by the within policy . . . . has been incorrectly stated . . . . the sum within assured is adjusted to 13*l.* 12*s.* in accordance with the tables of the company":—

Held, that the memorandum was a separate policy for the difference between these two sums, and must bear an ad valorem stamp.

CASE stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

The opinion of the Court was desired as to the stamp duty chargeable upon certain policies of the Prudential Assurance Company, Ld. (hereinafter called "the company"), and also upon the memoranda in writing endorsed thereon and signed by the general manager of the company, which policies with the endorsed memoranda had recently been presented to the commissioners pursuant to the provisions of s. 12, sub-s. 1 (*b*), of the Stamp Act, 1891, for their opinion as to the stamp duty chargeable thereon. The policies referred to were three in number and were taken out respectively by Amy Frances Franklin, by Samuel Bainbridge, and by Edward Alfred Barrington Glasspoole. Each of them had a memorandum endorsed, signed by the general manager of the company. The policy taken out by Amy Frances Franklin was dated December 1, 1913, and was a policy of assurance on the life of Amy Frances Franklin in which the sum assured, subject to the conditions endorsed thereon, was expressed to be

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12*l*. 8*s*. if the policy should have been in force for ten years. It was stamped with the duty of 3*d*., which is the duty chargeable under the Stamp Act, 1891, where the sum assured exceeds 10*l*. but does not exceed 25*l*. The proposal form signed by the assured contained a statement that the age of the assured, next birthday, was 51 years, and also a statement of the proposed weekly premium and of the amount proposed to be assured. Subsequently, the assured informed the company that she had incorrectly stated her age therein as 51 next birthday, and that it should have been 49 next birthday. Accordingly, the company, in order to adjust the terms of the policy in manner hereinafter appearing, on December 28, 1933, made the following endorsement on the policy, signed by the general manager: "Notice having been received by the company that the age of the person whose life is assured by the within policy has been incorrectly stated at fifty-one years instead of forty-nine years, the sum within assured is adjusted to 13*l*. 12*s*. in accordance with the tables of the company. (Sgd.) J. Burn, General Manager."

The second policy, taken out by Samuel Bainbridge, was dated March 17, 1930, and was a policy of assurance on the life of Samuel Bainbridge under which the sum assured was 24*l*. 6*s*. It was stamped with the duty of 3*d*., which is the duty with which a policy of life insurance is chargeable under the Stamp Act, 1891, where the sum insured exceeds 10*l*. but does not exceed 25*l*. The proposal stated that the age next birthday of the assured was 29 years, and was otherwise similar to that in the first-mentioned policy. Subsequently the assured informed the company that he had incorrectly stated his age in the said proposal form as 29 next birthday, and that it should have been 27 next birthday. Accordingly the company added an endorsement in form similar to the endorsement set out above, and increased the sum within assured to 26*l*. 2*s*. instead of 24*l*. 6*s*.

The third policy, taken out by Edward Alfred Barrington Glasspoole, was dated December 4, 1933, and was a policy of insurance on the life of Edward Alfred Barrington Glasspoole, under which the sum assured was 50*l*. payable at the end of

15 years from the date of the policy or at death if previous. It also contained a provision that the said benefit, exclusive of any bonus, would be doubled in the event of death as a result of accident as therein stated. It was stamped with the duty of one shilling, being sixpence, which is the duty with which a policy of life insurance securing 50*l.* is chargeable, and also sixpence, the duty with which a policy of insurance against accident is chargeable under the Stamp Act, 1891, and s. 40 sub-s. 2, of the Finance Act, 1920 (10 & 11 Geo. 5, c. 18). It was made in pursuance of a proposal in writing signed by the assured and dated November 21, 1933, which contained a statement that the age of the assured next birthday was 49. Subsequently the assured informed the company that he had incorrectly stated his age in the said proposal form as 49 next birthday, and that it should have been stated as 48 next birthday. Accordingly the company, on February 5, 1934, added an endorsement in form similar to that already set out, under which 50*l.* 13*s.* instead of 50*l.* was payable.

The commissioners were of opinion that the policies and the endorsed memoranda were separate instruments, each liable to stamp duty, and that the respective policies were each sufficiently stamped with the duties with which they were in fact stamped. They were further of opinion that each of the endorsed memoranda was liable to ad valorem duty. As regards the memorandum endorsed on the Franklin policy, they were of opinion that it was liable under the head of charge "Policy of Life Assurance" in Sch. I. to the Stamp Act, 1891, to the ad valorem duty of 1*d.*, being the duty applicable to a policy of life insurance "where the sum insured does not exceed 10*l.*" by reference to the increase of insurance from 12*l.* 8*s.* to 13*l.* 12*s.*—namely, an increase of 1*l.* 4*s.* They were similarly of opinion that as regards the memorandum endorsed on the Bainbridge policy, it was liable to the ad valorem duty of 1*d.*, the duty applicable to a policy of life insurance "where the sum insured does not exceed 10*l.*" by reference to the increase of insurance from 24*l.* 6*s.* to 26*l.* 2*s.*, namely an increase of 1*l.* 16*s.* With regard

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to the memorandum endorsed on the Glasspoole policy, the commissioners were of opinion that it was liable to the ad valorem duty of 1*d.* under the head of charge "Policy of Life Insurance where the sum insured does not exceed 10*l.*" by reference to the increase of insurance from 50*l.* to 50*l.* 13*s.*—namely, an increase of 13*s.*, and also to the duty of 6*d.* under the head of charge "Policy of Insurance against Accident" in the First Schedule to the Stamp Act, 1891, and s. 40 sub-s. 2, of the Finance Act, 1920.

The commissioners assessed the duty accordingly on the said policies.

The company contended: (1.) That the policies and the endorsed memoranda were not separate instruments, as claimed by the commissioners; (2.) That in respect of the endorsement on the Franklin policy no additional duty was chargeable, as the total sum insured did not in any event exceed 25*l.* and the policy was already stamped with the duty of 3*d.* applicable to a policy of life insurance where the sum insured exceeds 10*l.* but does not exceed 25*l.*; (3.) That in respect of the endorsement on the Bainbridge policy an additional duty of 3*d.* was chargeable, the difference between 3*d.* (where the sum insured exceeds 10*l.* but does not exceed 25*l.*) and 6*d.* (where the sum insured exceeds 25*l.* but does not exceed 50*l.*) in consequence of the increase from 24*l.* 6*s.* (a sum exceeding 10*l.* but not exceeding 25*l.*) to 26*l.* 2*s.* (a sum exceeding 25*l.* but not exceeding 50*l.*); (4.) That in respect of the endorsement on the Glasspoole policy additional duty of 6*d.* was chargeable, being the difference between 6*d.* (the duty on a life policy for a sum insured of 50*l.*) and 1*s.* (the duty on a life policy for a sum insured of 50*l.* 13*s.*). The company further contended that the Glasspoole policy having already been charged with the duty of 6*d.* under the head of charge "Policy of insurance against accident" in the First Schedule to the Stamp Act, 1891, and s. 40, sub-s. 2, of the Finance Act, 1920, did not become chargeable with any additional duty under the said head of charge by reason of the said endorsement.

Being dissatisfied with the assessments made and having paid the duty in accordance with the assessment of the commissioners, the company required the commissioners to sign and state this case.

The questions for the opinion of the Court were : (1.) Whether the respective policies and endorsed memoranda were liable to duty as assessed by the commissioners ? (2.) If not, to what duty were they liable ?

Spens K.C. and *T. N. Donovan* for the appellants. These memoranda do not constitute new policies, but only adjustments within the meaning of s. 20 sub-s. 4 (*a*), of the Industrial Assurance Act, 1923 (13 & 14 Geo. 5, c. 8), which enacts that " if the proposal form [for an industrial assurance policy] contains a misstatement as to the age of the person whose life is proposed to be assured, the society or company may so adjust the terms of the policy . . . . as to make them correspond with the terms which would have been applicable if the correct age of the person had been originally inserted in the proposal." In *Royal Exchange Assurance* v. *Hope* (1) it was held that where the time fixed in a policy of life insurance for the payment of the policy moneys was extended by endorsement on the policy, no new contract had been entered into, but the original contract had only been varied. All that was done here was to make the contract formally comply with the intention of the parties.

Sir Donald Somervell S.-G. and *J. H. Stamp* for the Crown. The section governing this case is s. 3 sub-s. 2 of the Stamp Act, 1891, which enacts that if more than one instrument is written upon the same piece of material each is to be separately stamped with its appropriate duty. It must be remembered that instruments are stamped, not transactions, the only exception being that under s. 106 of the Act of 1891. Here the endorsements are separate instruments, and the answer to the question, Where do the policy holders get their rights to the higher payments ? the answer must be, under these memoranda, i.e., under these instruments. By s. 91 of the Act of 1891, " ' policy of insurance ' includes every writing

(1) [1928] Ch. 179.

whereby any contract of insurance is . . . . evidenced." The right to the higher amounts are "evidenced" by these memoranda only. In *Royal Exchange Assurance* v. *Hope* (1) the question was treated as one of the intention of the parties, and no question of stamping arose.

Spens K.C. in reply. One cannot find in the memoranda alone contracts to pay the additional sums. If the company instead of by endorsement had produced the same result by altering the figures and initialling them, it could not have been said that a new policy had been made; but if the altered figures involved a higher duty that would be payable.

FINLAY J. This case, like nearly all cases under the Stamp Act, is troublesome, but I have arrived at the conclusion, after listening to a very clear argument, that the view of the Crown is right. I think the case is not entirely free from difficulty, but that it depends upon a rigorous adherence to the rule which must never be forgotten—namely, that under the Stamp Act one stamps, not transactions or anything of that sort, but one stamps instruments. What one has to do is to look at the particular instrument which is brought in for stamping, and arrive at a conclusion as to what it is.

It is not necessary to go in great detail through the facts, but, shortly put, what happened was this: there were three cases in which persons had made industrial assurances with the Prudential Assurance Company, who are the appellants. These assurances are, of course, frequently made with persons of humble position in life, and it not unnaturally happens in such cases that perfectly honest mistakes are made. Here, in each case, a mistake was made as to the age of the person who was the proposer. A slight complication—I mention it, though I think nothing turns on it—arises with regard to the case of Glasspoole by reason of the circumstance that there Glasspoole, who was insured for 50*l.*, was under a special provision to get double that amount if he died as the result of a violent accident. These three policies having been entered into, the amount payable, of course, depends, in accordance

(1) [1928] Ch. 179.

with tables, upon the age of the assured. The result is that if a person, who is really 49, by mistake says that she is 51, the policy will be wrong in this sense, that the computation will not have been correctly made, because a basic figure, namely, the age, has been wrongly stated. I will take the first case as representative of the three cases, the case of Mrs. Franklin. One starts with a policy, no doubt in the ordinary form, and one gets the sum assured as being, if the policy has been in force for six calendar months, 11*l.* 16*s.*, if for five years and less than ten years, 12*l.* 4*s.*, and for ten years, 12*l.* 8*s.* That was issued under a mistaken view as to the age of the lady. The mistake was discovered and thereupon this was endorsed upon the policy: "Notice having been received by the company that the age of the person whose life is assured by the within policy has been incorrectly stated at fifty-one years instead of forty-nine years, the sum within assured is adjusted to 13*l.* 12*s.* in accordance with the tables of the company." The question is, What from the point of view of stamping is the effect of that? I am not going through the other cases in detail, but it is proper to mention that in Bainbridge's case the effect of the adjustment which fell to be made was to put the sum assured above 25*l.*; and it was conceded on behalf of the company that in that case stamp duty was attracted, because the stamp is different, if the amount is above 25*l.*, from what it is if it is below 25*l.*

The contention, however, of the Crown, and the view which was accepted by the commissioners, was that there was here a new policy of assurance, and, to take the first case, the view of the Crown is that, whereas there was a policy of assurance for 12*l.* 8*s.*, there is now a policy of assurance for 13*l.* 12*s.* The contention on behalf of the company was that that is wrong, and that there were not two policies at all; that there was merely one policy and an adjustment to bring that policy into accord with what it always would have been if the facts had been understood.

My attention was called, of course, to the several sections in the Stamp Act, 1891, upon which the matter turns. Sect. 91 is: "For the purposes of this Act the expression 'policy of insurance ' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression ' insurance ' includes assurance." Sect. 3 sub-s. 2 says : " If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable." The case for the Crown is that here there is more than one instrument written upon the same piece of paper. If I rightly followed Mr. Spens' argument he agreed that if this had been done by the method of the issue of a fresh policy, then a fresh stamp would have been exigible. At all events, that is the view which I should certainly take. On the other hand, he said that it might have been done by the method of altering the figures and initialling them, which would not have attracted stamp. I think it is quite likely that is so. That shows the importance of adhering to the principle with which I began, of stamping the document as it is.

Mr. Spens called my attention to s. 20 sub-s. 4 of the Industrial Assurance Act, 1923. In my view, with the utmost deference, that sub-section, while it bears on the case, has nothing to do with the stamping point which I have to consider. It is this : " If a proposal form for an industrial assurance policy is filled in wholly or partly by a person employed by the society or company, the society or company shall not, except where a fraudulent statement in some material particular has been made by the proposer, be entitled to question the validity of the policy founded on the proposal on the ground of any misstatement contained in the proposal form : Provided that—(*a*) if the proposal form contains a misstatement as to the age of the person whose life is proposed to be assured, the society or company may so adjust the terms of the policy, or of any policy which may be issued in substitution or in lieu thereof, as to make them correspond with the terms which would have been applicable if the correct age of the person had been originally inserted in the proposal." That is, of course, a special provision with regard to industrial assurance, but I cannot see that it has any bearing upon the question of stamping. The society or company is to adjust the terms of the policy, and it depends entirely upon the method of adjustment whether a fresh stamp is or is not attracted.

Then my attention was called to a case of *Royal Exchange Assurance* v. *Hope* (1). The point which arose in that case was widely different from the matter which I have to consider. The point was, the policy having been assigned, whether an extension of the policy obtained by the assignor enured for the benefit of the assignee, and it was held that it did. The extension was given effect to by an endorsement on the policy, and apparently no question of stamp arose, for it is mentioned in the judgment of Lord Hanworth M.R. (2) that there was no fresh stamp, as there must have been if a new policy had been effected. The basis of the view of the Master of the Rolls was that there was no new policy or contract of assurance. In the present case I test it in this way, taking the first case: on the death of this lady the company will be liable to pay 13*l.* 12*s.* If it is asked, What is the evidence of that? I should say that that liability to pay 13*l.* 12*s.* is evidenced by this writing on the back of the policy; it is evidenced by that and by nothing else. That seems to me to be the substance of the matter. If the last thing I have said is right, it seems to me to be decisive of this question, and to show that here there are upon the same piece of paper two instruments, and accordingly it follows that in my view the Crown are right in their contention, and that the instruments have been correctly stamped.

Appeal dismissed.

Solicitor for appellants: *Herbert H. Moseley.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1928] Ch. 179.

(2) [1928] Ch. 190.

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DOYLE *v.* WHITE CITY STADIUM LIMITED.

[1933. D. 1468.]

Contract—Infant—Application for licence as boxer—Agreement to abide by rules of Boxing Board of Control—Agreement akin to labour contract—Contract for benefit of infant—Agreement to abide by any alteration of rules—Rules altered—Altered rules binding on infant in absence of notice.

The plaintiff, who was under twenty-one years of age, applied in March, 1932, for a licence as a boxer in the following words: "I hereby apply for a licence as a boxer and, if the licence is granted me, I declare to adhere strictly to the rules of the British Boxing Board (1929) as printed and abide by any further rules or alterations to existing rules as may be passed." A licence was duly granted and renewed for a further year on March 1, 1933. A copy of the rules was supplied to the plaintiff at the time of his application, and reg. 20, para. 16, provided that the boxer's money might be stopped only when he was disqualified "for committing a deliberate foul, for not trying, or retiring without sufficient cause, or if the referee gives a no contest decision." This paragraph was altered on June 17, 1932, to read: "Boxers in case of disqualification are only entitled to receive bare travelling expenses, pending the decision of the board . . . . when the board . . . . may deal with the money as it thinks fit." No notice of the altered rules was given to the plaintiff.

On July 12, 1933, the plaintiff agreed to box at the White City Stadium on the terms that he should receive 3000*l.* win, lose or draw. At the contest the plaintiff was disqualified for hitting below the belt. The promoters of the contest paid the sum of 3000*l.* to the Board of Control at their request, and after holding an inquiry the Board withheld the money from the plaintiff on the ground that he had been disqualified. The plaintiff brought proceedings to recover the amount against White City Stadium Ld., and the Board of Control.

MacKinnon J. dismissed the action against the White City Stadium Ld. on the ground that the contract for payment of 3000*l.* was not made with them but with the promoters; but gave judgment against the Board of Control, holding that, although the agreement with the Board of Control was binding on the plaintiff, notwithstanding his infancy, as being a contract analogous to a contract of employment and for his benefit, the board had no right to stop the sum of 3000*l.* under the original rule, and the rule as altered was not binding on the plaintiff because he had never received notice of the alteration. On appeal:—

Held (reversing MacKinnon J.'s decision as regards the altered rule), (1.) that the contract with the Board of Control was too closely connected with a contract as to employment that it was binding on the infant plaintiff, having regard to the fact that the contract as a whole was for his benefit; and (2.) that notice of the altered rules was unnecessary in order to make them binding on the plaintiff in view of the terms of his application for a licence.

Clements v. *London & North Western Ry. Co.* [1894] 2 Q. B. 482 applied on the first part.

Appeal from MacKinnon J.

The plaintiff Joseph Doyle (who was an infant suing by his next friend) was a professional boxer and professionally known as Jack Doyle. In March, 1932, the plaintiff had applied to the British Boxing Board of Control (1929) for a licence as a boxer and the form of application signed by him contained the following words: "I hereby apply for a licence as a boxer and, if this licence is granted me, I declare to adhere strictly to the rules of the British Boxing Board of Control (1929) as printed and abide by any further rules or alteration to existing rules as may be passed." A licence for a year was duly granted to him and renewed for a further year in March, 1933.

A copy of the rules furnished to the plaintiff when his application was made contained regulations constituting the Board as an association controlled by a president, two vice-presidents, and not exceeding 25 stewards to be appointed as there provided, and an honorary treasurer and a general secretary, with as its main objects "(*a*) to control and regulate professional boxing in the United Kingdom . . . . (*b*) to encourage professional boxing in the United Kingdom and safeguard licence-holders' interests . . . . (*c*) to arrange international agreements and promote the interests of British professional boxers in world's championships (*d*) to promote and safeguard the interests of British professional boxers throughout the world." Regulation 9, para. 9, provided that additions or alterations to the regulations (which the board were empowered to make by reg. 18A) should be submitted for confirmation to the next annual general meeting of members of the association. Regulation 15 contained provisions in regard to licences to promoters of professional boxing, boxers, boxers' managers and others, and para. 3 provided that any person to whom a licence was issued was to be deemed to have read the regulations of and to be a member of the Board of Control and to have agreed to accept any decisions under any of the regulations. Regulation 20, para. 16, provided: "Boxers' money to be stopped only when disqualified for committing a deliberate foul, for not trying, or retiring without sufficient cause, or if the referee gives a 'no contest' decision." This paragraph of the regulation was altered on June 17, 1932, to read: "Boxers in case of disqualification are only entitled to receive bare travelling expenses, pending the decision of the board or branch on the circumstances of the case, when the board or branch may deal with the money as it thinks fit. . . . ." No notice of the change of rules was given to the plaintiff.

On June 29, 1933, the plaintiff entered into an oral agreement through his manager, Dan Sullivan, with F. S. Gentle, to box with Jack Petersen at the White City Stadium on July 12, 1933, on the terms that he should receive 3000*l.* for the fight, win, lose or draw. The plaintiff alleged that F. S. Gentle entered into the agreement as agent for the White City Stadium Ld. The fight was for the heavyweight championship of Great Britain, and it duly took place, but during the second round the plaintiff was disqualified for hitting below the belt and Petersen declared the winner. On July 14, 1933, the secretary of the Board of Control wrote to the plaintiff asking him to appear before the administrative stewards of the Board on July 19, 1933, to explain his conduct in incurring the disqualification and "to give any information to the stewards to enable them to decide how the purse money shall be disposed of." The plaintiff attended at the meeting, answered questions and apologized for what had happened. The Board had previously requested Jeff Dickson, of Jeff Dickson Sports Promoters Ld., who were the promoters of the fight and had hired the White City Stadium for the contest, to pay them the sum of 3000*l.* agreed to be paid to the plaintiff and he had done so, stating in his letter dated July 14, 1933, in which the amount was remitted, that it represented the plaintiff's nett share. As a result of the inquiry held by them, the Board suspended the plaintiff's boxing licence for six months and further decided that out of the sum of 3000*l.* there should be paid 5*l.* a week to the plaintiff for six months, 5*l.* a week to the plaintiff's mother for six months, and that the method of dealing with the balance should be left to the discretion of the general joint committee of the Board of Control.

In these circumstances the plaintiff brought this action against the White City Stadium Ld. and the administrative stewards of the Board of Control, claiming the sum of 3000*l.*

MacKinnon J. held that the agreement to pay 3000*l.* to the plaintiff for the fight was not made with the White City Stadium Ld. but with Jeff Dickson or his company. He therefore gave judgment in favour of the White City Stadium Ld.

As regards the alternative claim against the administrative stewards of the Board of Control, the Board could only be entitled to forfeit the 3000*l.* if authorized to do so by their contract with Doyle, which had come into existence by reason of his application for and the grant to him of a licence. The plaintiff was, however, an infant and it was therefore contended that the contract was not binding on him. The rule was that with certain exceptions all contracts with an infant were voidable. Those not voidable because they were for the infant's benefit were contracts of apprenticeship, contracts for doing work and earning wages, and contracts by way of marriage settlements. There had been an extension of the second class to contracts incidental to employment, as in *Clements* v. *London & North Western Ry. Co.* (1) In this case the contract had this connection with the possibility of the infant doing work or labour or engaging in a performance for reward that, if he desired to enter on the career of a professional boxer, he could not do so without the licence of the Board of Control. The contract was thus for the infant's benefit, and was so nearly concerned with his entering upon a form of employment that it must be held binding on the plaintiff.

The action of the Board of Control in forfeiting the sum of

(1) [1894] 2 Q. B. 482.

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3000*l.* had in his view been done under the amended para. 16 of reg. 20. It could not have been done under the original para. 16, as the plaintiff had not on the evidence been disqualified for a deliberate foul. The question therefore arose whether the plaintiff was bound by the amended rules. In applying for a licence the plaintiff agreed to abide by any further rules or alteration of existing rules. Did that bind him to any alteration of which no notice was given to him? It was a well settled principle that if a contract was made by reference to other documents, the person seeking to rely on the other documents must show that their terms were reasonably brought to the knowledge and attention of the other party. He (his Lordship) therefore thought that when the plaintiff agreed to abide by any further rules or alteration of existing rules that was subject to the condition: "Provided that they are brought to my attention and a copy of them given to me, or an opportunity for obtaining a copy at the very least." It followed that the plaintiff was not bound by the new para. 11 and that he was therefore entitled to recover the sum of 3000*l.* from the administrative stewards as money had and received to his use.

The defendants, the administrative stewards of the British Boxing Board of Control (1929) appealed. The appeal was heard on July 10 and 11, 1934.

Sir Patrick Hastings K.C. and *Tristram Beresford* for the appellants. The plaintiff is bound by para. 16 of reg. 20, notwithstanding that he is an infant, as MacKinnon J. has found. If he were not he would not be allowed to box and would be deprived of his means of livelihood. But MacKinnon J. was wrong in holding that the plaintiff was not bound by that paragraph as altered in 1932. It is hard to believe that this alteration would not become known to every prizefighter within a very short time of its being made. In any case the plaintiff had agreed when applying for a licence to be bound by any alteration of the rules. Moreover, as a member of the association the plaintiff would be presumed to be acquainted with its rules: *Raggett* v. *Musgrave.* (1) In *Morgan* v. *Driscoll* (2) Sargant J. held that when in the case of a voluntary association to provide for such of the members as might become incapacitated for their work, there was power to alter the rules, such a power was prima facie valid, and if used bona fide it had the effect of making all existing members bound by the altered rules, provided that the alteration did not go to the foundation of the association and was not incompatible with the fundamental object. The same test was applied in *Thellusson* v. *Viscount Valentia* (3) in regard to the alteration of the rules of a club. So too in *Burke* v. *Amalgamated Society of Dyers* (4) it was held that the alteration by a trade union of its rules as to sick benefit to the prejudice of a member who was then insane was binding upon him if made in accordance with the rule authorizing and regulating the alteration of the rules of the union. When these cases are applied to the present case it is clear that the alteration of the rules was binding on the plaintiff independently of his receiving notice of the alteration.

[ROMER L.J. What right had MacKinnon J. in granting a stay of execution pending appeal to make it a condition that 500*l.* was to be paid to the plaintiff and retained by him whatever the result of the appeal?]

In a number of cases a stay of execution has only been granted subject to part of the damages being paid to the plaintiff to be irrecoverable from him, but he was not aware on what authority this was done. Applications of the kind were generally put forward on the ground of poverty.

Serjeant Sullivan K.C. and *Martin O'Connor* for the respondent. The respondent being an infant was not bound by the rules and regulations notwithstanding the agreement contained in the application for a licence. The agreement was not one of the class recognized as binding on an infant where its provisions were for the infant's benefit. An infant could not be said to be bound by a contract properly so called, but in the case of a contract as to necessaries the infant may

(1) (1827) 2 Car. & P. 556, 557.
(2) (1922) 38 Times L. R. 251.
(3) [1907] 2 Ch. 1.
(4) [1906] 2 K. B. 583.

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be treated as bound: see *In re Rhodes, Rhodes* v. *Rhodes.* (1) The infant's obligation even as to necessaries was only to make a fair payment in respect of them: *Nash* v. *Inman* (2); *In re J.* (3) An infant could only be made liable for a contract for necessaries, including contracts as to apprenticeship or employment at wages: *De Francesco* v. *Barnum* (4); *Corn* v. *Matthews* (5); *Clements* v. *London & North Western Ry. Co.* (6) MacKinnon J. had relied on the last of these cases to show that there had been an extension of contracts for necessaries binding an infant. But the only other contracts referred to are contracts contained in marriage settlements, and there was no justification for extending this class of contract to contracts incidental to employment.

Further, no term that an infant is to be subject to a penalty or forfeit the fruits of his labours will be enforced: *De Francesco* v. *Barnum.* (4)

[Romer L.J. Surely it is to the interest of the infant that he should be bound by this contract, as otherwise he would not be able to obtain a licence.]

The Court may treat the terms of a contract with an infant as open to revision or reject some of the terms and treat the remainder as valid: *Bromley* v. *Smith.* (7) Therefore if the Court does not accept the contention that the entire contract is voidable it should reject the forfeiture provisions from the agreement constituted by the grant to the respondent of a licence to box. Unless the forfeiture provisions can be enforced the respondent has a clear right to the sum of 3000*l.* paid to the appellants as money belonging to him.

Para. 16 of reg. 20 as it existed at the time when the licence was granted to the respondent was not a forfeiture clause but was for the protection of the boxer by preventing the promoters from withholding his money unless he had been disqualified "for committing a deliberate foul, for not trying or retiring without sufficient cause, or if the referee

(1) (1890) 44 Ch. D. 94, 105.
(2) [1908] 2 K. B. 1.
(3) [1909] 1 Ch. 574.
(4) (1890) 45 Ch. D. 430.
(5) [1893] 1 Q. B. 310.
(6) [1894] 2 Q. B. 482.
(7) [1909] 2 K. B. 235.

gives a no contest decision." In these cases the boxer would have failed to carry out his contract and would have no claim to the money, so that the regulation deprived the boxer of nothing, but saved him from having the money stopped for any other cause. The position was very different under the amended provision, but on its construction that provision ought to be treated as applying to the same subject-matter as reg. 8, that is, a prize and not money payable to a boxer, win, lose or draw. But in any case the new provision operated as a penalty or forfeiture depriving the boxer of the fruit of his labour, and that was the type of provision which had never been treated as binding on an infant.

It had been suggested at the trial that the respondent had been guilty of a deliberate foul so as to come within para. 16 of reg. 20 in its original form, but MacKinnon J. was satisfied that there was no ground for that. Therefore the retention of the money by the appellants could only be justified under the new paragraph. There was no justification however, for saying that the respondent was bound by amended regulations which he had never seen and in respect of which he had received no notice. On this ground also the respondent was not bound by the amended regulation and MacKinnon J. was right in so holding.

[They also referred to *Ex parte Jones* (1) and *Leslie* v. *Fitzpatrick*. (2)]

[No reply was called for.]

Lord Hanworth M.R. This case has been fully argued and raises some interesting points. The action was brought by Joseph Doyle (professionally known as Jack Doyle), who is an infant, by his next friend. The statement of claim says: "The plaintiff is an infant and he obtains his livelihood by professional boxing." The pleading then goes on to say that certain terms were arranged for a boxing match which was to take place, and in fact did take place, on 12th July, 1933. Para. 4 says: "The said contest took place between the

(1) (1881) 18 Ch. D. 109.

(2) (1877) 3 Q. B. D. 229.

plaintiff and the said Petersen as agreed, on 12th July, 1933, and the said Petersen was declared the winner." The statement of claim further sets out that by terms which are contained in a letter written by Mr. Gentle to the plaintiff: "You are to receive 3000*l.* after the fight. This is of course clear to you and is exclusive of percentage and training expenses," and that is accepted by Mr. Doyle. More than that, there is a letter from Mr. Doyle which states the terms. The letter I refer to is in the statement of claim and says: "I am to receive 3000*l.* win, lose or draw, after the Petersen fight." That fight took place under the auspices of and under the rules and conditions laid down by the British Boxing Board of Control, of which the stewards are persons of some eminence who are established as a board to control boxing. The objects for which it is stated to be formed are: "To control and regulate professional boxing in the United Kingdom and to act as a Board of Appeal" and "To promote and safeguard the interests of British professional boxers throughout the world."

The Board requires that if persons are to take part in fights to which they give countenance, there shall be licences granted to the fighters and also that the promoters are to be members of this association. In effect the rules which are before us clearly indicate that the Board have taken steps to secure that all persons, whether promoters or managers or boxers, shall all of them be members of this society or association and under the control of the board. This fight was a fight recognized by the Board. The secretary wrote on June 23, 1933, to Messrs. Jeff Dickson: "The Board"—that is the administrative stewards—"at a meeting yesterday decided to recognize the above mentioned contest"—that is the contest which ultimately took place on July 12—"as being for the heavyweight championship of Great Britain. Officials for the contest will be appointed later," and the Board give a personal notice of this to Mr. Jack Doyle, c/o Mr. Sullivan, his manager, and a similar letter was written to Mr. Petersen.

The result of those letters and the facts which are not in dispute is that this fight was one in which the heavyweight championship of Great Britain was in issue and one which was subject to the regulations of the Board of Control. It will be found that at the end of the rules there are a number of boxing rules relating to the contests. They contain minutiæ in respect of the contests, such as, for instance: "All contests to be decided in a roped ring not less than 14 ft. or more than 20 ft. square." Powers are given to the referee, including power to disqualify a contestant for any of the acts there set out. Then it is provided: "The breaking of any of these rules by a contestant or his seconds shall render such contestant liable to disqualification. A contestant disqualified for any cause whatever shall not be entitled to any prize, except in accordance with regulation 20, paragraph 16," and reg. 20, para. 16, provides: "Boxers in case of disqualification are only entitled to receive bare travelling expenses, pending the decision of the board or branch on the circumstances of the case, when the board or branch may deal with the money as it thinks fit. Every disqualification must be reported to the board or branch by the referee within twenty-four hours of the contest taking place." It will be seen, therefore, that these rules are framed for the purpose of securing what I will call clean fighting by disqualifying persons who use certain strokes such as hitting below the belt, using the pivot blow, and using a number of other technical strokes which are barred by the regulations. It is plain therefore that the Board does endeavour to promote and safeguard the interests of professional boxers throughout the world by laying down these rules.

In fact a sum of 3000*l.* was put up for the plaintiff whatever happened in the course of the fight, win, lose or draw. But the rules I have read contain the definite statement that a boxer who is disqualified shall only be entitled to receive bare travelling expenses, and that the board may deal with the money as it thinks fit. There is no question at all that on July 12, 1933, the plaintiff was disqualified in the contest at the second round, and he was called upon to go before the Board or their representatives for them to investigate the circumstances; and it is in evidence that he apologized for his conduct. The learned judge's note of the plaintiff's evidence on that point is: "I appeared before the Board. I apologized for my conduct. I did not appeal under the rules."

A great number of points have been raised in the course of the case, but I should like first of all to consider what is the meaning and purpose of these rules and of the adhesion of the plaintiff to them. That adhesion was secured by the plaintiff's becoming a licensee of the Board. In order to do that he made application for a licence. That application was made in March, 1932, and approved on March 15, 1932, and the year for which the licence ran began on March 5, 1932. He is said to have been an infant at the time aged eighteen years—though perhaps the term "boy" which was used by Serjeant Sullivan was a little inapt, because his exact fighting weight at the time of the application for the licence was fifteen stone. The licence was granted on the terms of his application, which was as follows: "I hereby apply for a licence as a boxer and, if this licence is granted me I declare to adhere strictly to the rules of The British Boxing Board of Control (1929) as printed, and abide by any further rules or alteration to existing rules as may be passed. I agree to pay the fee in accordance with the above." The licence granted ran until March 4, 1933, and it was then extended and ran until March 3, 1934. So that when the fight took place on July 12, 1933, the plaintiff entered the ring as a licensee of the Board and as one who had agreed to adhere strictly to the rules of the Board of Control and to abide by any further rules, or alteration to existing rules.

The rules in fact were altered on June 17, 1932, and no point is now taken that the new rules were not validly passed. But it is said that inasmuch as the licence was originally granted before the rules had been changed the rules as they stood after alteration and at the time of the fight were not binding upon the plaintiff. It will be observed however that the terms of the application for the licence give plain leave to alter the rules or promulgate further rules. When these rules as altered are still for the purpose of carrying out the original purpose of the society or body of persons, the altered rules are made binding on the plaintiff. If there was an attempt fundamentally to alter the purpose for which the rules had been originally drawn up, the prospective agreement to adhere to fresh rules, or any alteration in the rules, would not apply. It is quite plain from the decision in *Thellusson* v. *Viscount Valentia* (1) that if and so long as the rules are akin to the purpose for which a society exists, there is no inherent objection to an alteration of those rules or to further rules being made for the same purpose. Here the alteration in the rules is for such a limited purpose. If, for example, the alterations had been to turn a society connected with British boxing into a society for conducting horse-racing, the position might have been far different. It is said that the terms of reg. 20, para. 16, as altered, are such as to involve a very considerable alteration, because the altered rule provides that boxers in case of disqualification are only entitled to receive their bare travelling expenses, while the rule before the alteration provided that a boxer's money was to be stopped only when he was disqualified for committing a deliberate foul, for not trying, or for retiring without sufficient cause. It is said therefore that the earlier rule was one of limited application, but that the later rule was one of disqualification at large. That enlargement of the rule may well have been in the interests of the contestants themselves. It may well be that the Board did not find that they had sufficient authority in respect of those persons who broke the rules and that it was too difficult to justify a disqualification on the particular ground when blows were being struck rapidly and the question whether or not the foul was deliberate might be a matter of opinion. And it seems to me that the rule was passed giving greater power to the Board entirely for the purpose of preserving clean fighting, a matter that enures, be it remembered, to benefit as much the contestant who fails as the contestant who succeeds. It is a rule which is applicable on both sides and cannot be looked at merely

(1) [1907] 2 Ch. 1.

from the particular point of view of one person such as the plaintiff in this case.

In fact the plaintiff, having been disqualified, the Board after inquiry and after the plaintiff had appeared before them and apologized, decided to withhold the 3000*l.* as they had power to do under this rule in their discretion. This action was brought to recover the money, it being alleged that the particular defendants, that is the individual members of the Board against whom the action succeeded, were not entitled to intervene and stop the money from being handed over to the plaintiff. The action was brought, alternatively, against the White City Stadium Ld.; but the learned judge held that there was no cause of action against them and judgment was entered for them. There is no appeal as to that. The appeal is brought by those individual members of the Board, the administrative stewards of the Board, against whom judgment was given for the sum of 3000*l.*

The learned judge first had to consider whether or not the rules in their original form were rules which bound the plaintiff, who is an infant, and he came to the conclusion that the contract was "so nearly concerned with his entering upon a form or employment or occupation that I think I ought to hold that it is within the type of contract which, if found to be for his benefit, the Court ought to hold is not voidable by the infant." Then he dealt with the question whether he was bound by the altered rules and came to the conclusion that although the application for the licence contained the wide term that I have read he ought to add to that a term which he suggested himself—namely, "Provided that the new rules or alterations are brought to my attention and a copy of them given to me." There are no such words in the rules themselves or in any document which was the basis of or ancillary to the contract; these words are introduced by the learned judge himself.

I turn back now to consider whether or not the contract as found by the learned judge—the contract that is contained or partly contained in the terms on which the licence was asked for—is good and binding upon the infant. It was argued with force by Serjeant Sullivan and Mr. O'Connor that no contract with an infant can be supported other than a contract as to necessaries including employment and services to be rendered by the infant's labour, when the law will presume an obligation on the part of the infant to pay. Serjeant Sullivan bases his contention that only this limited range of contracts is binding upon the infant upon passages to be found in Sir Edward Coke's Institutes, and confirmed in a number of the Digests. Of these a number of illustrations are to be found in cases to which our attention has been called. To my mind that statement of the law is too narrow. It is unnecessary at the present moment to decide it, but I confess that as at present advised I find difficulty in acceding to the view that there is nothing that can properly be called a valid contract on the part of an infant—that all that can be inferred is an obligation on his part, which is improperly termed a contract, to repay money spent in supplying necessaries. There is authority for that view in the case of *In re Rhodes* (1), but it seems to me that the words used must be read in relation to the subject-matter being dealt with, the particular case of necessaries. I say that for the reason that in *Ryder* v. *Wombwell* (2), a case decided in 1868, the Court, which consisted of learned judges to whom we must all pay deep respect—namely, Willes, Byles, Blackburn, Montague Smith and Lush JJ., referred in terms to the fact that an infant could make a contract. Further Willes J. in giving the judgment of the Court says (3): " As is accurately stated by Parke B., in *Peters* v. *Fleming* (4), ' From the earliest time down to the present, the word necessaries was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word " necessaries " in its unqualified sense, but with the qualification above pointed out '." Throughout that case the reference is to a contract for necessaries, and that

(1) 44 Ch. D. 94, 105.
(2) (1868) L. R. 4 Ex. 32.
(3) L. R. 4 Ex. 38.
(4) (1840) 6 M. & W. 42, 46.

was in the year 1868. Soon after, the Infants Relief Act, 1874, was passed, and s. 1 provides: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) . . . . shall be absolutely void"; and later we find cases in which definite reference is made to the contracts of infants.

I say no more upon that view expressed in *In re Rhodes* (1); but I turn to three cases which to my mind are binding upon this Court. The first is *De Francesco* v. *Barnum* (2), where Fry L.J. says (3): "I approach this subject with the observation that it appears to me that the question is this, Is the contract for the benefit of the infant? Not, Is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial. That appears to me to be in substance a question of fact."

In *Corn* v. *Matthews* (4) the matter came again before the Court of Appeal, and Lord Esher M.R. definitely said (5): "It seems to me that the judgment of Fry L.J. is one with which one would agree, and, although it makes the major premise larger than it had been previously enunciated in such cases, it does not alter the law applicable to them," and he repeats what Fry L.J. had said, and particularly that the mere fact that some of the conditions in the deed are against an

(1) 44 Ch. D. 94, 105.
(2) 45 Ch. D. 430.
(3) 45 Ch. D. 439.
(4) [1893] 1 Q. B. 310.
(5) Ibid. 314.

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apprentice, does not enable the Court on that ground to say that the agreement is void. He says that the question is whether or not the terms are such as would on the whole be beneficial to the infant, and it seemed to him in the particular case that there was a term which was so unfair to the infant and solely in favour of the master that it made the whole contract unfair. The term was one that if there was either a strike, or what we now call a lock-out, the master could cease to pay the apprentice's wages though the master himself had caused the lock-out, and it was on the ground of this term that the Court held the contract to be unreasonable and against the interest of the infant; but *Corn* v. *Matthews* (1) definitely confirms the principles laid down by Fry L.J.

Then in *Clements* v. *London & North Western Ry. Co.* (2) we have once more the statement made that the whole contract is to be looked at. That was a case in which the infant whilst employed by the railway company joined an insurance society formed among the employees of the railway company towards the funds of which the railway company contributed, and in return for being a member and getting that contribution, the infant agreed not to bring any proceedings under the Employers' Liability Act; he set aside, in other words, a very considerable advantage given to him by statute, but it was held by Lord Esher that the contract was one which was for the benefit of the infant, and he says (3): "I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether, on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate." A. L. Smith L.J. in his judgment in that case quotes the passage from *Corn* v. *Matthews* (1) and says (4): "In my judgment, the agreement, instead of being detrimental to the infant, is, on the whole,

(1) [1893] 1 Q. B. 310.
(2) [1894] 2 Q. B. 482.
(3) [1894] 2 Q. B. 489.
(4) Ibid. 495.

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manifestly to his advantage." It was therefore held effective and binding. Those cases are binding upon us. The learned judge on the question of fact has held that the terms of the agreement in this case are favourable and to the advantage of the infant, and it seems therefore that the application of the rules cannot be held to be prevented by reason of the plaintiff's infancy.

I should just like to add a few more words by way of emphasis to show that I have both appreciated and at the same time reject the view which has been advanced by Serjeant Sullivan. He spoke of the position of the plaintiff as if he was one who had agreed to render services, indeed I think he said that the plaintiff provided an exhibition for the defendants on the terms that win, lose or draw he should receive 3000*l*., that he was therefore entitled in any event to receive that sum for services rendered, that the withholding of the money was in the nature of a penalty and that a penalty could not be to the infant's advantage so as to be binding on him. To my mind all those observations involve a complete misreading of these rules and of the terms and conditions under which the fight took place. It is as much in the interests of the plaintiff himself as of any other contestant that there should be rules for clean fighting, and that he should be protected against his adversary's misconduct in hitting below the belt or doing anything of the sort. There is no question of his rendering services to employers. The position is that he himself has been given the opportunity of making his livelihood by professional boxing on terms and conditions which safeguard him as a contestant from any improper conduct on the part of those with whom he may engage in fight. Moreover the rules contain specific provisions under which the interests of the boxer are safeguarded in respect of any conduct of the promoter or manager with whom or through whom he may have to make arrangements and terms.

On all these grounds, therefore, I come to the same conclusion as that of the learned judge—namely, that this plea of infancy does not avail to prevent the plaintiff from

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being bound by the rules and conditions provided for in his application for a licence.

Let me say one more word about the alteration of the rules. It appears to me, as I have said, that the rules were properly altered, validly altered. What reason have we then for introducing the proviso which the learned judge added in his judgment, the words "Provided that they are brought to my attention and a copy of them given to me"? Why should that term be implied? We have not to apply the principles laid down in the case of *The Moorcock* (1), where an implication is necessary for the purpose of carrying out the intention of the parties. The proviso introduced by the learned judge is to the benefit of the infant, but to the disadvantage of those with whom he had contracted, and it was introduced without the foundation of any such suggestion having been made in the course of the negotiations between the parties. Inasmuch as the application for the licence gave authority to the Board to alter the rules it appears to me that there is no ground whatever for introducing this proviso as to notice.

That really deals with all the points which have been raised except one. It is said that the plaintiff was here entering into a competition for a prize and that the Board have withheld from him money in respect of which he had a vested right. I object to the use of that expression "a vested right." I think "prize" is not to be read in the rules as only meaning something in respect of which there has been a competition or contest. The word "prize" does not necessarily mean that. I take the second definition as given in an old copy of Johnson's Dictionary of the meaning of the word "prize": "A reward gained by any performance." He would have gained the 3000*l.* if he had not by his conduct been disqualified, but he was disqualified.

Upon these grounds I am of opinion that the plaintiff is not entitled to recover. The appeal must therefore be allowed with costs here and below and judgment entered for the present appellants, who were the defendants to the claim.

(1) (1889) 14 P. D. 64.

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I must add one more word, and that is as to the terms on which a stay of execution was granted. It will be observed that the rules provide that a sum could be paid to the contestant even though the bulk of the money otherwise due to him was withheld, and in the present case the suggestion was made that 5*l.* a week should be paid to the plaintiff and 5*l.* a week to his mother over a period of twenty-six weeks. That would amount to the sum of 260*l.*, and the defendants were content that that provision should be made. A stay of execution was asked for, and while the defendants were quite agreeable to that amount being paid over, MacKinnon J. thought that the sum should be not merely 260*l.*, but a sum of 500*l.*, and the order was made, that of the sum of 3000*l.* to be paid into Court the sum of 500*l.* should be allocated to the infant plaintiff not to be returnable in any event. That term in the judgment as drawn up caused some comment in this Court, for although a plaintiff who is successful in the Court of first instance is entitled to stand upon that judgment on the presumption that it is right, yet the defendants are entitled to take their case to a higher Court, and it would seem an inroad upon the possible rights of the parties if it were to be stated that a part of the sum allotted in the Court of first instance to the plaintiff was not to be returnable even though the appeal might be successful. MacKinnon J. has communicated with me and let me know that he certainly did not intend that that term "not to be returnable in any event" should cover the whole of this 500*l.* It is a term which one was surprised to see, because it is necessary to keep the rights open between the parties. That, of course, does not preclude the Court of Appeal or a Court of first instance from saying in a case where some damages must be awarded to the plaintiff with finality, that although the matter is going to a higher Court where the quantum of damages is to be further discussed, yet as there is something obviously coming to the plaintiff, an aliquot part of that amount should be definitely awarded to him without awaiting the result of the appeal. That was not what occurred in the present case. It is quite obvious that this term has slipped into the order per incuriam, and my only reason for referring to the matter is to show that in ordering the repayment of the sum in excess of 260*l*. we are not giving any general order to be observed in all cases, but one relating to the particular circumstances in this particular case in which, as I have said, the words "not to be returnable in any event" were appropriated by some mistake to that increased portion beyond the 260*l*.

For these reasons, as I have said, the appeal must be allowed with costs here and below and judgment entered for the defendants.

Slesser L.J. On March 5, 1932, the plaintiff, who was at all material times an infant, applied for a licence from the British Boxing Board of Control (1929) in order that he might take part in prize fights to be carried on under their licence and control. In that application he agreed to abide by the rules and regulations of the British Boxing Board of Control in the following terms: "I hereby apply for a licence as a boxer and, if this licence is granted me, I declare to adhere strictly to the rules of The British Boxing Board of Control (1929) as printed, and abide by any further rules or alteration to existing rules as may be passed. I agree to pay the fee in accordance with the above." He did so pay the fee, and upon those terms he was granted a licence, and we are told that a year later the licence was renewed. The effect of applying for that licence in those terms and the acceptance of those rules was to make him a member of the British Boxing Board of Control, for by reg. 3 it is provided that: "'The Members' of the British Boxing Board of Control (1929) are all the licence holders," and by reg. 15, para. 3, it is provided that any person to whom a licence is issued after payment of the fee "shall be deemed to have read the regulations of the British Board of Control and shall further be deemed to be a member and to have agreed to accept any decisions under all or any of these regulations, and to submit himself to the constitution and code of the regulations of the British Boxing Board of Control."

In those circumstances, subject to the particular matters which have been argued before us and considered in the Court below and in this Court, it would appear that this plaintiff had agreed, first, by his application, which was accepted, and secondly, by the actual provisions of the rules themselves, to be a member of this society and to be bound by its rules and regulations. It would follow that the rules and regulations would authorize the society dealing with the money which was to be his prize or reward for taking part in this contest in the way in which they have dealt with it. But in substance two arguments have been used in this case to support the view that they are not so entitled to deal with this money and that the plaintiff is entitled himself to have it paid over to him by the promoters. The first of those arguments rests upon the fact that he is an infant. It is said that whatever contract or alleged contract he has entered into under these rules is not binding on him on account of his infancy. If that contention is right, it is an answer to the defendant's claim to keep this money. It is an argument which has not found favour with MacKinnon J., and it does not find favour with me either. It depends really on two separate considerations—first, whether this agreement is of the order of agreement under which an infant can properly bind himself; and secondly, if it does come within that order, whether this particular agreement can be stated to be so for the benefit of the infant as to be binding upon him. On the first point Serjeant Sullivan has relied very strongly on the argument that for many, many years the types of agreement which are binding upon infants have been narrowly prescribed and defined, and that as this particular agreement is not within that narrow definition and prescription, it is not one which can properly be said to be binding upon the infant.

I would like to associate myself with what has been said by Kay L.J. in *Clements* v. *London & North Western Ry. Co.* (1) to the effect that it is doubtful whether there is a general principle that if an agreement be for the benefit of

(1) [1894] 2 Q. B. 482, 493.

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the infant it shall bind him. Kay L.J. there quotes the dictum of Sir George Jessel in *Martin* v. *Gale* (1), where he says: "There must be some mistake in the report of what Buller J. is stated to have said" in *Maddon* v. *White*. (2) "No case can be found in which Lord Mansfield or Lord Hardwicke had laid down any such general principle"; and I am not prepared here to say that there is any general principle that all agreements for the benefit of an infant will necessarily bind him. In my view that question does not arise in the present case, because the contract with which we have here to deal is so analogous, so similar in character, to the classes of agreement which have been held to be binding upon infants, if for their benefit, that it can properly be brought within the old category of decisions without having to rely on any more general principle.

The origin so far as we know of the definition of the class of contract binding upon infants on which Serjeant Sullivan relies (and nothing earlier has been suggested) is to be found in Coke upon Littleton, p. 172*a*, where he says: "An infant may bind himself to pay for his necessary meat, drink, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards", and to that has been added in the course of years contracts of service which are to his benefit.

The problem, which we have here to consider, how far that principle ought to be extended was considered by this Court in *Clements* v. *London & North Western Ry. Co.* (3) That was a case where although it was stated by some members of the Court that it might be considered that the contract under consideration was part of the contract of labour, yet at least two members of the Court were at pains to point out that, even if strictly it was not part of the contract of labour, it was so incidental or ancillary to the contract of labour as properly to be one where the infant might bind himself. That case, I think, has dealt with the very problem which Serjeant Sullivan has put before us to-day. Kay L.J., for

(1) (1876) 4 Ch. D. 428, 431.
(2) (1787) 2 T. R. 159.
(3) [1894] 2 Q. B. 482, 493.

example, says (1): "Suppose, however, as has been argued, that this is not a labour contract, would the same rule apply?" He says (1), "I will not attempt to say how far the rule extends, but that it does apply to some contracts that are not contracts of labour is clear from many decided cases." He then proceeds to cite a number of cases which, I agree, deal mostly with the marriage settlements of infants, but he is dealing with them for the purpose of showing that an infant's liability under a contract applies in cases other than contracts of labour, and at the end he sums the matter up thus (2): "Even if this contract were not, as I think it is, a contract concerning the terms of employment of the infant, I think it would come within the rule that I have been discussing, and that the Court might say that the contract was for the benefit of the infant, and elect for him, while he is an infant, to confirm it, treating it as not being a void contract but at most only voidable." A. L. Smith L.J., as I read his judgment, does not think, or at any rate does not clearly express the view, that the contract there was a part of the contract of service at all. He, as I read it, rather takes the view that it was a contract which was sufficiently akin to a contract of service to be one by which the infant might properly be bound. He says that the contract is binding upon the infant and is a fair contract, because as a result he avoids litigation, and if successful will have a fund out of which he can recover; he avoids the uncertainty of getting a verdict.

If the realities of the present case be looked to and the dicta which are to be found scattered in the authorities that the opportunity of an infant to earn his living is one of the matters which may properly be said to be binding when that opportunity has been given to him by a contract, it becomes clear, I think, that as the licence which this infant obtained was the means whereby he was able to enter into a contract of service or performance, whichever it may be, as a boxer, and thereby to earn his living, it was ancillary and incidental

(1) [1894] 2 Q. B. 492. (2) Ibid. 494.

to the contract which he made with the promoter of the fight. As Sir Patrick Hastings pointed out in the course of the case, if Serjeant Sullivan were right, the result would be that no infant could ever obtain a licence from this society, because it would be very unlikely that they would give him one unless he in his turn was bound to some obligation of proper fighting, and he would be debarred for ever from taking part in any boxing contests at all. Whether that would be a good thing in the national interest is not, of course, a matter for me to consider, but that that would be the result it seems difficult to deny.

In all those circumstances I think that without laying down any general principle and looking at the facts of this case, for it is very largely a question of fact, the learned judge was right when he said that he could find in *Clements* v. *London & North Western Ry. Co.* (1) ample authority for saying that this contract was so associated with the class of contract of service which an infant may make so as to be binding upon him that it was binding upon him.

There remains the question, was it for his benefit ? Serjeant Sullivan has called our attention to the fact that there are many dicta to the effect that where a contract imposes a penalty or a forfeiture that is not good as against the infant. But I, on the other hand, have been impressed with the consideration which has been pointed out in several of the cases —in *Corn* v. *Matthews* (2) and in the older case of *Wood* v. *Fenwick* (3)—that an infant cannot make a contract of service without having in it some incidents which may not in themselves be directly beneficial to him but may be beneficial to the master. In *Wood* v. *Fenwick* (3) the headnote says : " A contract of hiring and service, for wages, is a contract beneficial to and binding upon an infant, though it contain clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages." In contracts of apprenticeship, which are admittedly contracts binding upon an infant, the

(1) [1894] 2 Q. B. 482.
(2) [1893] 1 Q. B. 310.
(3) (1842) 10 M. & W. 195.

right of the master to proceed not only financially but in the old days corporeally against the infant have not made the contract of apprenticeship invalid as against the infant. Therefore I agree with the learned judge that this contract is for the benefit of the infant and is one binding upon him.

If that be so his position is the same as that of any other member of any association which contains within its rules a power to alter the rules. Here, with respect, I differ from the learned judge in his conclusion that because this particular member did not receive notice of the alteration of the particular rule it is not therefore binding upon him. At one time I thought it was going to be argued that the general meeting which altered the rule was not a valid meeting because this member did not receive notice of it. An omission to send him a notice would not in itself, I think, invalidate the meeting. In reg. 9, para. 4, it is expressly provided that: "The non-receipt of any notice by any member shall not invalidate the proceedings at any general meeting," and I cannot read that as being so limited as merely to mean that when a notice has been sent and not received, the meeting shall not be invalid. I think it is reasonable in the case of a society with a large number of members to hold that the proceedings of the society cannot be set aside merely by pointing to the fact that a particular member has not had a notice sent to him. But as a matter of fact I do not think that argument is open in this Court at all. It apparently was never raised in the Court below, and it formed no part of the judgment of the learned judge.

I come, therefore, to the learned judge's judgment, which is based upon the fact that this particular member is not bound by this alteration of rule because he did not receive a notice. In my opinion that is incorrect. My Lord has referred to the case of *Thellusson* v. *Viscount Valentia* (1), and it is sufficient to quote one passage from the judgment of Lord Cozens-Hardy M.R., who after quoting a rule which gives power to alter the rules in a certain way at the annual general meeting, says: "That seems to me to be not a very

(1) [1907] 2 Ch. 16.

skilfully drawn rule, I agree, but nevertheless a rule expressly stating that a proposal for adding to or altering the rules of the club is within the competence of the members of the club, and that every member of the club, by joining this club, takes it subject to the contingency that the rules may be altered by this particular majority, at a particular meeting held according to those rules."

Finally I would mention *Burke* v. *Amalgamated Society of Dyers* (1), which dealt with the alteration of the rules of a trade union where the person complaining was insane. It was said, and perhaps said with some force, that in such a case the amended rule was not binding upon him, because he was not mentally in a position to appreciate what had been done. A. T. Lawrence J. said (2): "We have had an able argument to the effect that the alteration of rule 39 was ineffective as against the deceased member, because it was made after he had become a lunatic and at a time when it was out of his power to dissent from it. The analogy was suggested of the determination of the authority of an agent" —that was an argument which Mr. Martin O'Connor addressed to us here to-day—" and no doubt the analogy is plausible; but it is not true, for the authority of the majority is not really that of agents. The real ground on which the power of the majority to make an alteration rests is that the original contract entered into between the society and each of its members contained a power of alteration of the rules by the stipulated majority. That power is a fundamental part of the constitution of the society, and no member can claim the benefits while ignoring the existence of the rule." At one time Serjeant Sullivan was inclined to answer Romer L.J. by saying that the plaintiff could claim the benefits, while disowning the obligations, imposed upon him by the rules. I think that observation is sufficient to dispose of such a contention.

For all these reasons therefore I am of opinion that this appeal should be allowed as stated by my Lord.

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(1) [1906] 2 K. B. 583.

(2) Ibid. 591.

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Romer L.J. I agree. By reg. 17, para. 6, of the constitution and regulations of the British Boxing Board of Control it is provided that " No person other than a member shall be permitted "—I am only reading the material words for this purpose—" to take part in any contest " held under the sanction of the British Boxing Board of Control. A member is defined by reg. 3 as being a licence-holder. By reg. 15, para. 3, it is provided as follows : " Any person or persons to whom a licence is issued, after payment of the fee as herein stated, shall be deemed to have read the regulations of the British Boxing Board of Control and shall further be deemed to be a member and to have agreed to accept any decisions under all or any of these regulations, and to submit himself to the constitution and code of the regulations of the British Boxing Board of Control." We have seen the form of application for a licence that is required to be signed by any one desirous of becoming a member, and that application contains these words : " I hereby apply for a licence as a boxer and, if this licence is granted me, I declare to adhere strictly to the rules of The British Boxing Board of Control (1929) as printed, and abide by any further rules or alteration to existing rules as may be passed."

The practical effect of all that is that any one who wishes to carry on the profession of a boxer in this country must become a member of the British Boxing Board of Control (1929) and must enter into a contract with that association to be bound by its rules present and future. One of the rules which the plaintiff in those circumstances agreed to be bound by is reg. 20, para. 16 ; that as it stands at present was not one of the original rules when he became a member, but it was altered in pursuance of the power to that effect contained in the regulations which were in existence when he became a member. That provides as follows : " Boxers in case of disqualification are only entitled to receive bare travelling expenses, pending the decision of the board or branch on the circumstances of the case, when the board or branch may deal with the money as it thinks fit." When, therefore, at the contest for the heavyweight championship of Great

Britain held at the White City on July 12, 1933, the plaintiff in the course of the first two rounds, which in consequence of his disqualification became the only two rounds of the contest, unintentionally committed five fouls, his share of the purse, which was 3000*l.*, became liable to be dealt with by the board under para. 16 of reg. 20. They did deal with it under that paragraph and came to the conclusion that the plaintiff should not receive any part of the 3000*l.*, though they offered, as has been pointed out by the Master of the Rolls, to pay over to him and his mother some 260*l.*

Of course if the plaintiff had been an adult there would have been no question as to the action of the Board of Control. The 3000*l.* would have been lost to the plaintiff. But it has been argued by Serjeant Sullivan that inasmuch as the plaintiff at the date when he purported to become a member of the Board of Control was a minor, and still is a minor, the contract of membership between him and the association is not binding on him. It is said that it is not binding on him because in the first place the contract is not of a class which an infant can enter into, whether it be favourable or unfavourable to him; secondly, that if it be a contract of that class this particular contract is so detrimental to his interest that it ought not to be held to be binding upon him. Dealing with the first of those two points, it appears to me for the reasons which I have already given that this contract of membership being an essential in practice to the plaintiff for obtaining employment as a professional boxer is so bound up with those contracts of employment which he hopes to enter into, that it must have applied to it the considerations that are applied to a contract of service in the case of an infant; in other words, I think really that the case is governed by and falls within the principles enunciated in *Clements* v. *London & North Western Ry. Co.* (1), a case which has already been referred to by my Lords. I cannot doubt myself that this is a contract of a class into which an infant can enter assuming the contract be for his benefit.

It is then said by Serjeant Sullivan that this contract is

(1) [1894] 2 Q. B. 482.

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so detrimental to the interests of the infant that the Court ought not to hold him to be bound by it. The learned Serjeant referred us to one matter in respect of which he said this contract was detrimental to the interests of the infant; there were others, but the learned Serjeant concentrated on one as being that most apposite to the present case. He said that it was very detrimental to the interests of an infant that he should not be at liberty to commit unintentional fouls in boxing except at the risk of losing his share in the prize money or—for I do not think the learned Serjeant used the word "prize"—in the purse. Of course such a contract as this contains clauses which impose some limit on the unrestricted liberty of the boxers, as one would expect it to do. But in considering whether any particular contract is detrimental to the interests of the infant the Court has to look at the contract as a whole, and if it comes to the conclusion looking at the contract as a whole that it is for the benefit of the infant, it disregards the fact that it contains some clauses which, standing by themselves, might not appear to be so. I agree entirely with the Master of the Rolls in thinking that the clauses which in the present case impose restrictions upon the liberty of action of the boxer are in the interests of clean boxing in this country and therefore are in the interests of the boxers themselves of whom the plaintiff is one. The particular clause, reg. 20, para. 16, is merely one of the sanctions, and, I think, necessary sanctions, available for securing the fulfilment of the rules imposed upon boxers and others subjected to them.

I therefore come to the conclusion that this contract is binding upon the plaintiff. I am very glad to be able to come to that conclusion, because if this Court came to any other it would follow that at no time during the last three or four years during which, as I understand, the plaintiff has been boxing has he been eligible to take any part in a contest held under the sanction of the British Boxing Board of Control, a conclusion, I should have thought, from which the plaintiff would shrink. However that may be, I agree that the contract is in fact binding on him and that he is a member of this association. If the contract were not binding upon him, he would not be a member of this association, with the consequences I have just indicated.

It only remains for me to say one word about the ground upon which the learned judge decided in favour of the plaintiff. He held that this contract was for the plaintiff's benefit and was binding upon him except in one respect. He said towards the end of his judgment: "If a contract is made merely by reference to other documents, the party to the contract seeking to rely upon those other documents must establish that the terms of those other documents were reasonably brought to the knowledge and attention of the other party." With all respect to the learned judge, I can only say that I know of no authority for that proposition when applied to such a contract as we are dealing with in the present case; indeed, the authorities to which reference has already been made by the other members of the Court are in direct opposition to it. But in point of fact, at the time the plaintiff did become a member of this association he was handed a copy of the rules as they then existed, or so I understand, and those rules contained the rule which enabled the rules to be altered from time to time. He had, therefore, full notice of the documents which were incorporated in his contract by reference.

For these reasons I agree that this appeal succeeds. I only desire to add that I wish to associate myself in every respect with what the Master of the Rolls has said about the stay of execution which was granted in this case.

Appeal allowed.

Solicitors: *Ellis & Ellis; Edmond O'Connor & Co.*

H. C. G.

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March 1, 2,
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BANCO DE VIZCAYA *v.* DON ALFONSO DE BORBON Y AUSTRIA.

International Law—Enforcement of foreign Penal Law.

The Spanish Government declared the defendant, the ex-King of Spain, to be a traitor, and decreed that all his property and grounds of action should be seized for the benefit of the State, and that all bankers in Spain having in deposit any such property should make delivery thereof to the Spanish Treasury. Certain securities, the private property of the defendant, had been deposited at the W. Bank in London to the order of the plaintiffs, a Spanish bank in Spain, as the defendant's agents. Both the plaintiffs and the defendant claimed the delivery up of these securities and the W. Bank interpleaded:—

Held, that as the plaintiffs claimed no personal title to the securities, were not asserting their contractual rights as they originally existed but those rights as altered by the above decrees, upon which they must rely, and as, in substance, they were not asserting their own right at all, but that of the Spanish State, a judgment in their favour would involve the execution of a foreign penal law. Therefore the plaintiffs' claim failed.

INTERPLEADER ISSUE.

Don Alfonso de Borbon y Austria, ex-King of Spain, brought an action against the Westminster Bank, Ld., claiming the delivery up to him of 8200*l.* four per cent. Victory bonds, and the certificates for 4000 1*l.* shares in Trinidad Central Oilfields, Ld. The bank claimed no interest in them but said that they were claimed by the Banco de Vizcaya, and this interpleader issue was ordered to be tried, the Banco de Vizcaya being plaintiffs and the ex-King of Spain defendant.

The securities in question had been purchased by the defendant with his own money, and were deposited with the Westminster Bank in London to the order of its Madrid branch as the defendant's agents. On September 7, 1923, the above branch being about to be closed, the defendant gave instructions that the London branch of the Westminster Bank should hold the securities to the order of the plaintiff bank, as the defendant's agents. On May 13, 1931, by a decree of the Spanish Republic, all the private property of the defendant in Spain was seized, and bankers established in Spain who had such property in deposit were ordered to deliver it up to the Spanish Treasury. On November 25, 1931, by a decree of the Constituent Cortes of Spain, the defendant was declared guilty of high treason and an outlaw and it was decreed that all his property, rights and grounds of action should be seized for its own benefit by the Spanish State. In consequence the defendant on April 25, 1932, brought an action against the Westminster Bank, Ld., in London, for the delivery up of the said securities held by them, which were also claimed by the plaintiffs, and this interpleader issue was ordered to be tried.

Stuart Bevan K.C. and *H. G. Robertson* for the plaintiffs. These securities are the property of the defendant, in Spain. His rights are against the plaintiff bank only, to be enforced in the Spanish courts, and under Spanish law. Those rights, by Spanish law, have been transferred to the Spanish Republic. This is not a penal action, and the enforcement of the plaintiffs' rights does not involve the execution of a foreign penal law.

Schiller K.C. and *Bensley Wells* for the defendant. The penal laws of one country will not be enforced by the courts of another country: *Ogden* v. *Folliot* (1), *Wolff* v. *Oxholm* (2), *Huntington* v. *Attrill* (3), and *In re Fried Krupp Actien-Gesellschaft.* (4) These decrees of the Spanish Government are penal, consequent on the declaration that the defendant was guilty of high treason. And the plaintiffs have to prove an affirmative title, being plaintiffs in an interpleader issue: *Jennings* v. *Mather* (5), but they are really setting up a jus tertii, that of the Spanish Government, which they have not the right to do: *Richards* v. *Jenkins.* (6) The plaintiffs are estopped from denying the title of their bailor; they can only do so by setting up a title paramount, and for that must rely upon these penal Spanish decrees. It is true that the right of the defendant against the plaintiffs might be a chose in action in Spain, but his right to the property is a right in rem against everybody: *Wetherman* v. *London and Liverpool Bank of Commerce, Ld.* (7)

[*Favorke* v. *Steinkopff* (8) was also referred to.]

(1) (1790) 3 T. R. 726.
(2) (1817) 6 M. & S. 92.
(3) [1893] A. C. 150, 155, 156.
(4) [1917] 2 Ch. 188.
(5) [1901] 1 Q. B. 108.
(6) (1887) 18 Q. B. D. 451.
(7) (1914) 31 Times L. R. 20.
(8) [1922] 1 Ch. 174.

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Stuart Bevan K.C. in reply. This is an action of contract under Spanish law, and the plaintiffs' contractual rights have been altered by Spanish law. This is the defendant's property in Spain, and penal legislation is enforceable if it affects only property within the area in respect of which that legislation is passed.

Cur. adv. vult.

1934. March 9. LAWRENCE J. read the following judgment: In this interpleader issue the plaintiffs, the Banco de Vizcaya, a Spanish bank, affirm, and the defendant, H.M. Don Alfonso de Borbon y Austria, ex-King of Spain, denies, that the plaintiffs are entitled as against the defendant to certain securities and the possession thereof, and to delivery thereof by the Westminster Bank, Ld., in London. The securities in question were purchased by the defendant with his own moneys and by his instructions deposited with the Westminster Bank in London to the order of its Madrid branch as the defendant's agent. On September 7, 1923, the Madrid branch of the Westminster bank being about to be closed, the defendant gave instructions to that branch and to the plaintiffs that the securities should be held by the Westminster Bank in London to the order of the plaintiffs as the defendant's agents. These instructions were carried out by the Westminster Bank's head office in London sending the securities to its Foreign Office branch in London to be placed " under the dossier of the plaintiffs' rubric Don Alfonso de Borbon y Austria."

On May 13, 1931, a decree was enacted by the President of the Provisional Government of the Spanish Republic, providing by art. 1 for the seizure of all properties situate or placed in Spain which might belong to the private fortune of the defendant, and by art. 3 that bankers established in Spain, who had in deposit such properties as were referred to in art. 1, should make delivery thereof to the Spanish Treasury. On June 3, 1931, an order of the Spanish Ministry of Finance was made for the due execution of the decree of May 13, 1931 and on November 25, 1931, a decree was enacted by the Constituent Cortes of Spain declaring the defendant to be guilty of high treason and an outlaw, and that all the properties, rights and grounds of action belonging to him which were situated within the national territory would be seized for its own benefit by the Spanish State.

In these circumstances, on April 25, 1932, the defendant brought an action against the Westminster Bank for the delivery of the securities to him. The Westminster Bank interpleaded, and the plaintiffs now claim to be entitled to the securities in question on the ground that the transaction which took place on September 7, 1923, was a contract under which the defendant's rights in respect of the securities became solely a right of action against the plaintiffs as depositaries; that that right of action was situated in Spain; that the effect of the above-mentioned decrees was to transfer the defendant's right of action to the Spanish Republic; and that the rights of the plaintiffs against the Westminster Bank remained unimpaired. It is not suggested that the plaintiffs have or ever had any lien on the securities, or claim of any kind against the defendant. It is contended on behalf of the defendant that these decrees are penal laws of a foreign state and ought not to be recognized in an English court.

In such circumstances the judgment of the Judicial Committee of the Privy Council in *Huntington* v. *Attrill* (1) lays down that I have to construe and apply an international rule and to determine, first, the substance of the right sought to be enforced, and in the second place whether its enforcement will directly or indirectly involve the execution of a penal law of another state.

In my judgment, the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the

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(1) [1893] A. C. 150, 155.

Spanish Government in defiance of the mandate of the defendant, and, that being so, it seems to be unarguable that the enforcement of the plaintiffs' right will not directly or indirectly involve the execution of the decrees.

It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action, because they are not asserting the right of the Spanish Government, but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention. The plaintiffs are not asserting their contractual rights as they originally existed, but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic. It is true, as is pointed out in *Huntington* v. *Attrill* (1), that some actions for penalties are not penal actions within the meaning of the above mentioned international rule—where, for instance, the penalties are not exigible by the State in the interest of the community, but by private persons in their own interest. But in the present case the penalty imposed is seizure by the State for its own benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant is by virtue of these decrees, and they are compelled to admit that they have no personal right or title to the property in the securities. In the words of Lord Loughborough in *Folliott* v. *Ogden* (2): "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend." These words have frequently been cited with approval, and in my judgment they are directly applicable to the present case. I therefore hold that H.M. Don Alfonso and not the plaintiffs is entitled to the securities in question.

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(1) [1893] A. C. 150, 156.

(2) (1789) 1 H. Bl. 124, 135.

That disposes of the issue, but it is perhaps desirable that I should notice two other contentions on behalf of the defendant: (1.) that the present proceedings are proceedings in rem and that even if the Spanish Republic's right to affect the right of action of the defendant against the plaintiffs in Spain must be recognized, the decrees do not purport to affect the defendant's right to the securities themselves, which are and have been at all material times in this country; (2.) that the plaintiffs have not established their right to claim the securities. Evidence as to the effect of the decrees in Spanish law was called on behalf of the plaintiffs and was not contradicted, and, as I understand that evidence, the defendant under Spanish law had no right to the securities themselves or against the Westminster Bank, but only a right of action as depositor against the plaintiffs as depositaries. I am not satisfied that Spanish law was the law of the contract made between the defendant and the plaintiffs with reference to these particular securities, which were then deposited in an English bank in England, but as this question was not fully argued, I do not decide the case on this ground.

As to the plaintiffs' right to claim in these proceedings, I think that I must assume that the Court of Appeal by their judgment, April 10, 1933 [on an interlocutory appeal in this case (1)] decided that if the plaintiffs could establish their right to the possession of these securities they were entitled to succeed on this issue, even though in so doing they relied on a right to the property in the securities in the Spanish Republic; but in my judgment the plaintiffs have not discharged the onus which rests on them of proving any right to possession. The Spanish lawyer who was called did not give any evidence as to the effect of the decree of November 25, 1931, upon the decree of May 13, 1931, and I am therefore compelled to decide its effect without the help of any evidence on the subject. In my opinion, the true interpretation of the decree of November 25, 1931, is that the Spanish State, and the

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(1) (1933) 49 Times L. R. 414.

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Spanish State alone, can seize the properties of the defendant, and as there is in this decree no provision analogous to art. 3 of the decree of May 13, 1931, I hold that the plaintiffs have not established any right to possession of the securities.

For this reason, therefore, as well as for the reason that the enforcement of the plaintiffs' claim involves the execution of the penal law of a foreign state, I decide this issue in favour of H.M. Don Alfonso de Borbon y Austria, with costs.

Judgment for defendant.

Solicitors for plaintiffs: *Petch & Co.*
Solicitors for defendant: *Johnson, Jecks & Colclough.*

W. L. L. B.

Haynes v. *Harwood & Son* [1935] 1 K. B. 146
Applied. Hyett v. Great Western Railway Company
[1948] 1 K. B. 345

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HAYNES *v.* HARWOOD.

[1933. H. No. 3021.]

Negligence—Plaintiff Police Constable stopping bolting horses—Volenti non fit injuria—Risk in Course of Duty.

The plaintiff, a police constable, was on duty inside a police station in a street in which, at the material time, were a large number of people, including children. Seeing the defendants' runaway horses with a van attached coming down the street he rushed out and eventually stopped them, sustaining injuries in consequence, in respect of which he claimed damages:—

Held, (1.) that on the evidence the defendants' servant was guilty of negligence in leaving the horses unattended in a busy street; (2.) that as the defendants must or ought to have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life and limb, and as the police were under a general duty to intervene to protect life and property, the act of, and injuries to, the plaintiff were the natural and probable consequences of the defendants' negligence; and (3.) that the maxim "volenti non fit injuria" did not apply to prevent the plaintiff recovering.

Brandon v. *Osborne Garrett & Co.* [1924] 1 K. B. 548 approved.

Cutler v. *United Dairies (London), Ld.* [1933] 2 K. B. 297 distinguished, and dicta therein questioned.

Decision of Finlay J. [1934] 2 K. B. 240 affirmed.

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APPEAL from a decision of Finlay J.

The plaintiff, Thomas John Haynes, a Metropolitan police constable, claimed damages (agreed at 350*l.*) from the defendants, G. Harwood & Son, for personal injuries sustained by him as a result of the defendants' negligence. On August 24, 1932, a two-horse van belonging to the defendants was left unattended by the driver in Paradise Street, Rotherhithe. He had put a chain on one of the wheels (which was afterwards found broken), but for some reason, possibly because of a stone having been thrown at them by a boy, the horses bolted along the street, which was frequented by a number of persons, including children.

The plaintiff was in the police station in Paradise Street. He was on duty, but not on point duty. He looked out and saw the horses and van coming; he rushed out, seized the reins and eventually stopped the horses, sustaining injuries in so doing. The defendants denied negligence, and said that the plaintiff had voluntarily undertaken the risk of injury, and that they would rely on the maxim "volenti non fit injuria." They also alleged contributory negligence, and also relied on the doctrine of common employment.

An executive officer from Scotland Yard gave evidence that the orders of the Metropolitan police provided that all the efforts of a police constable must be directed to the preservation of life and property, but that they contained no express provision that it was his duty to try to stop a runaway horse.

Finlay J. held that the defendants were guilty of negligence, and that as they must have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life and limb, and also that as the police were under a general duty to intervene to protect life and property, the act of and the injuries to the plaintiff were the natural and probable consequence of their negligence. He held further that the plaintiff did not, within the true meaning of the maxim "volenti non fit injuria," agree to take a risk knowing all the circumstances, but acted pursuant to his

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official duty. He therefore gave judgment in favour of the plaintiff for 350*l.*, the agreed amount of damages.

The defendants appealed.

Rowland Thomas K.C. and *G. J. Paull* for the appellants. The decision of Finlay J. was wrong, first, on the ground that no negligence on the part of the appellants' servant was established. There was no reason to disbelieve his statement that he had put the chain on the wheel of the van; he adopted the procedure which he had invariably followed; he knew his horses; he knew the locality; and there was nothing to suggest to him that the horses were likely to bolt. Moreover, in doing what he did the respondent took the risk of being injured. He was under no duty to attempt to stop the horses. As is said in Beven on Negligence, 4th ed., vol. i., p. 5: "It is clear there is no legal duty on a man seeing another in the water drowning to plunge in and rescue him; nor yet on a passer-by seeing a child under the feet of a horse to pull him out and prevent his being run over." It may be said, and was said, that a police constable is in a different position from a private individual. There is no ground for this assumption. The respondent was not on point duty regulating traffic, and even if he had been, and had abstained from attempting to stop the horses, his position in the force would not have been prejudicially affected. Finlay J. followed and applied the decision of Swift J. in *Brandon* v. *Osborne Garrett & Co.* (1), but that case is clearly distinguishable. There Mrs. Brandon incurred the risk of injury, but she did so in order to save her husband, who was in peril from falling glass. Swift J. there said, however (2): "I do not say that there is a legal duty to risk one's own life to save that of a stranger; indeed, I should unhesitatingly say there was not, but there may be a nearer approach to such a duty to save the life of one's child or wife or husband." That last observation is in line with the dictum of Slesser L.J. in *Cutler* v. *United Dairies (London), Ld.* (3), where he said (4): "There may be cases, where, for example, a man sees his child in great peril in the street and, moved by paternal affection, dashes out and holds a runaway horse's head in order to save his child, and is injured; there there is no novus actus interveniens." Here the circumstances were quite different, and it is submitted that the observations of Scrutton L.J. in the last cited case exactly apply; he there said (1): "A horse bolts along a highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it seems to me that he is not. . . . A man is under no duty to run out and stop another person's horse, and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse." In this case the respondent was perfectly aware of the risk he was running and voluntarily incurred it.

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(1) [1924] 1 K. B. 548.
(2) Ibid. 554.
(3) [1933] 2 K. B. 297.
(4) Ibid. 306.

[*Eckert* v. *Long Island Railroad Co.* (2) and *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (3) were also referred to.]

Lastly, the doctrine of common employment applies and excludes any liability of the appellants to the respondent: *Hayward* v. *Drury Lane Theatre, Ld.* (4); *Heasmer* v. *Pickfords.* (5) The fact of the existence of an emergency does not preclude the application of the doctrine: *Houghton* v. *Pilkington.* (6)

Hilbery K.C. and *N. R. Fox-Andrews* for the respondent.

[GREER L.J. We do not desire to hear you on the point as to common employment.]

Here there was clearly a breach of duty on the part of the appellants' servant when he left the horses unattended in a busy street, and the injury to the respondent was directly traceable to that breach of duty. When danger threatened to those in the street, particularly to children, there was a moral and natural impulse to endeavour to ward off that danger, and that is particularly true in the case of a police constable. As Sir Frederick Pollock says (Law of Torts, 13th ed., p. 498): "The law does not think so meanly of

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(1) [1933] 2 K. B. 303.

(2) (1871) 43 N. Y. 502; 3 Am. Rep. 721.

(3) (1897) 24 R. 1001.

(4) [1917] 2 K. B. 899.

(5) (1920) 36 Times L. R. 818.

(6) [1912] 3 K. B. 308.

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mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue." See also Professor Goodhart's article on "Rescue and Voluntary Assumption of Risk" in Cambridge Law Journal, vol. v., p. 192, where this subject is learnedly considered.

[They were stopped.]

GREER L.J. This is an appeal from a decision of Finlay J. in which he awarded the plaintiff damages for personal injuries to the agreed amount of 350*l*.

In order to understand the case, and to apply the law, it is necessary that I should state quite shortly the relevant facts. The defendants were the owners of a two-horse van which was being driven by their servant, a man named Bird, on August 24, 1932. The business on which he was engaged on behalf of his employers took him into Quiney's Yard and Quiney's Wharf, on the left-hand side of Paradise Street, Rotherhithe. Bird, who had in the van two horses, one, a mare on the left or near side, the other, a gelding on the right or off side, had to go to the wharf and there unload goods. His van was provided with a chain which, when properly put in position, operates as a drag on the near back wheel of the van. As there is a slope down from the road to the wharf it is usual to put the drag on, and, according to Bird's evidence, he did that on this occasion. When he had finished his unloading Bird had to get a receipt, but instead of waiting where he was for this, he, out of consideration for the wharf owners, who wanted to go on with their work by receiving another van to unload at their wharf, took his two horses and the van out into Paradise Street, and left them standing on the left-hand side of the street facing in the direction of the police station, while he went to get his receipt. In his evidence he said there was no room in the yard for him to have left his van and horses there. Personally, I doubt that, but even accepting for the moment his statement that there was not sufficient room in Quiney's

Yard for him to stay there with his van that affords no sufficient excuse for his doing something indicating an absence of reasonable care for the safety of those properly using the highway. He came out, and I accept the evidence which was given on behalf of the defendants by an independent observer who says that what then happened was this: two boys were coming along, and one of them, obviously with a mischievous propensity, threw a stone at the horses which caused them to run away. The horses ran a considerable distance without any one interfering with them until they got opposite the police station, where the plaintiff was in the charge room. Seeing what was happening, he came out into the street and there saw a woman who was in grave danger if nothing was done to rescue her; he also saw a number of children who would be in grave danger if nothing was done by him to arrest the progress of the horses. At great risk to his life and limb, he seized the off-side horse and tried to stop them both. After going about fifteen yards, he succeeded in doing so, but unfortunately one of the horses fell upon him, with the consequence that he suffered serious personal injuries entailing pecuniary loss, which both parties have agreed at 350*l.*

In considering this case one must take into account the nature of the street in which the two horses were left. A little way to the left of Quiney's Yard, on the opposite side of the road, are certain tenement dwellings, and just opposite Quiney's Yard there are dwelling-houses. Coming along on the same side as were the horses and van, one finds a church, a school entrance, and a number of houses which, having regard to the locality, are probably occupied by working-class people with families. We are told that altogether there are three schools in this neighbourhood, and that between 4 and 5 o'clock in the afternoon there are always many children about. It was in this kind of place the defendants' driver chose to leave his vehicle.

It is said for the defendants that the plaintiff is in law without remedy, and in support of this contention certain reasons are given. Before dealing with those, however, I

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may say that it would be a little surprising if a rational system of law in those circumstances denied any remedy to a brave man who had received his injuries through the original default of the defendants' servant. If the matter concerned this case alone, and we had not to deal with certain dicta in other cases, I should have been content to say that I agreed with the admirable judgment of Finlay J., but in view of those dicta I do not think I ought to be content with dealing with it in that short way.

It was said that there was no evidence of negligence on ① the part of the defendants' driver; secondly, assuming there was some evidence of negligence, the accident happened ② through the intervention of some consciously acting persons between the wrongful conduct of the defendants' driver and the accident; in other words that there was a novus actus interveniens, and therefore the chain of causation between the cause of the accident and the damage was broken and the plaintiff's claim cannot be sustained. It was said, thirdly, ③ that quite apart from, and independently of, that question the plaintiff himself assumed the risk which he ran and took the risk upon himself, and therefore as the damage he suffered was the result of his own act, he cannot recover. That again is conveniently put into the Latin phrase, "volenti non fit injuria." A further point, which was made only by Mr. Paull, the junior counsel for the defendants, was that the plaintiff was in common employment with Bird, and therefore, upon the rules laid down with regard to common employment, the plaintiff was not entitled to succeed.

I propose to consider first, upon general principles, whether these points are sound. What is meant by negligence? Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim. In this case, if the duty was owed to, among others, the plaintiff—if he is one of a class affected by the want of care or the negligence of the defendants, that is negligence of which the plaintiff can avail himself as a cause of action. What is the negligence complained of here? Mr. Hilbery rightly described it as a failure to use reasonable care for the safety of those who were lawfully using the highway in which this van with the two horses attached was left unattended. I personally have no doubt that a policeman—or indeed any one, and still more a policeman, using the highway for the purpose of stopping a runaway horse and thereby preventing serious accidents and possibly preventing loss of life, is within the category of those lawfully using the highway. Accordingly, I think the first point fails. Of course it does not follow that in all circumstances it is negligence to leave horses unattended in a highway; each case with all its circumstances has to be considered; but the circumstances which make it quite clear that the defendants' servant was guilty of a want of reasonable care in leaving his horses unattended are that this was a crowded street in which many people, including children, were likely to be at the time when the horses were left and before the defendants' servant could get back to them. The defendants' servant had been frequently in the neighbourhood; he had often delivered goods at Quiney's wharf; and he must be taken to know something of the character of the neighbourhood, although he denied any knowledge of schools being there. To leave horses unattended, even for such a short time as three minutes, in a place where mischievous children may be about, where something may be done which may result in the horses running away, seems to me to be negligent—having regard to the proved circumstances.

The next point involves a consideration of the maxim "novus actus interveniens," but before dealing with the authorities I wish to point out that it is not true to say that where a plaintiff has suffered damage occasioned by a combination of the wrongful act of a defendant and some further conscious act by an intervening person, that of itself prevents the Court coming to a conclusion in the plaintiff's favour if the accident was the natural and probable consequence of the wrongful act. That seems to me to be the necessary result of the decided cases which are accepted as authorities.

The third point relied upon for the defendants is volenti non fit injuria. Unfortunately there is a dearth of authority in this country on the subject, and apparently a wealth of authority in the United States. American decisions of course are not binding upon us, and we must act only upon principles which are accepted in this country. There is also, unfortunately, an observation made, obiter, by Scrutton L.J. in *Cutler* v. *United Dairies* (*London*), *Ld.* (1), which has to be dealt with and explained, an observation which I think has been much misunderstood and misapplied in the argument put before us.

I now deal quite shortly with the authorities: in *Lynch* v. *Nurdin* (2) the facts were these: the defendant left his horse and cart in the roadway, where he had a right to leave it. Probably he had left it there for a much longer period than the period in this case, but if it is negligent to leave it for one hour it seems to me it may be negligent, though in a less degree, to leave it for three or five minutes. In the road where the defendant left his cart there were a number of children who began to play with the horse and cart; one of them jumped on to the cart; another of them wrongfully set the horse in motion whereby the plaintiff, who was the child upon the cart, was injured. Undoubtedly there was there a novus actus interveniens—namely, the misconduct of the boy who started the horse; but it was held that none the less the accident, and the damage, could be treated as a result of the defendant's wrongful act, because it was to be anticipated that children would do mischievous things, and that any one who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong but that it was done by the mischievous children. The law as there laid down has been accepted since 1841, and (it seems to me) is by itself sufficient to decide the question that there is no absolute rule that an intervening act of some third person who is not the defendant is in itself enough to break the chain of causation between the wrongful act and the damage and injury sustained by the plaintiff. In *Engelhart*

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(1) [1933] 2 K. B. 297, 303.

(2) (1841) 1 Q. B. 29.

v. *Farrant & Co.* (1) the negligence on which the action was based was the negligence of a driver who got off his van to do something which ought to have been done by the boy who accompanied him. While the driver was away the boy started the horse and van, with the result that a serious accident happened to the owner of another vehicle in the neighbourhood. In that case reliance was placed for the defence on the fact that there was an intervening act of the boy for which the employer was not responsible because it was not within the boy's authority to drive the horse at all, that he was not acting for his employers when he did it, and therefore that the employer was not liable. That case went to the Court of Appeal, where Rigby L.J. accurately stated the law as applied to cases of this kind thus (2): "I am of the same opinion. It is not questioned here that if Mears's negligence is that to which the accident can be attributed the defendant is liable. It was argued, with some show of authority I agree, that wherever between the negligence of a servant and the incident the act of some third person intervenes, and is the proximate cause of the accident, the employer is not liable. I do not consider that that is the state of the law upon the authorities. There are numerous cases. There is the case that Lopes L.J. referred to before Tindal C.J. [*Illidge* v. *Goodwin* (3)] and *Lynch* v. *Nurdin* (4), which was tried before Williams J., whose decision, that it was a proper case to leave to a jury, was supported by the Court, the judgment being by Lord Denman C.J. There are many other cases; but I take it that the question is a question for a jury,"—that is to say, it is a question of fact—" and that we, sitting here and dealing with the finding of the county court judge as to matters of fact, ought to exercise the functions of a jury. The county court judge has found that Mears was negligent. About that there can be no doubt at all, and he has found it as a fact. He has also found that Tucker was negligent, and that might be important if the point of law contended for on behalf of the plaintiff [*qu.*

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(1) [1897] 1 Q. B. 240.

(2) Ibid. 246.

(3) (1831) 5 C. & P. 190.

(4) 1 Q. B. 29.

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defendant ?] were really established law; but I do not think it is. I think it is right here to say that the county court judge was entitled to find upon the facts in favour of the plaintiff, that the Divisional Court was right in supporting that finding, and that we ought now to support it ourselves."

If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley* v. *Baxendale* (1), the accident can be said to be "the natural and probable result" of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving that the damage is the result of the wrongful act.

There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

The third ground was that the principle of volenti non fit injuria applied. On this there is very little actual authority in this country and no actual decision of the Court of Appeal, but there is a very helpful decision of Swift J. in *Brandon* v. *Osborne Garrett & Co.* (2) There is, however, a wealth of authority in the United States, and one of the cases, which is quite sufficient to show what the American law is, has been cited to us—namely, *Eckert* v. *Long Island Railroad Co.* (3) The effect of the American cases is, I think, accurately stated in Professor Goodhart's article to which we have been referred on "Rescue and Voluntary Assumption of Risk" in Cambridge Law Journal, vol. v., p. 192. In accurately summing up the

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(1) (1854) 9 Ex. 341.
(2) [1924] 1 K. B. 548.
(3) 43 N. Y. 502.

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American authorities and stating the result of *Eckert's* case (1) the learned author says this (p. 196): "The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty." In my judgment that passage not only represents the law of the United States, but I think it also accurately represents the law of this country. It is, of course, all the more applicable to this case because the man injured was a policeman who might readily be anticipated to do the very thing which he did, whereas the intervention of a mere passer-by is not so probable.

In the case before Swift J. to which I have referred—*Brandon* v. *Osborne Garrett & Co.* (2)—a wife received injury by reason of doing something to protect her husband from further injury due to the wrongful act of the defendants. The learned judge, quite properly in my judgment, rejected the defence that as it was her own act which brought about her injury she could not recover. That decision is in point, if it is right, and I think it is right.

But still we have to consider certain observations in *Cutler* v. *United Dairies (London), Ld.* (3) I may say at once that the decision in that case has no bearing on the question we have to determine. The decision related to facts as to which it could not be said that the injured man was doing what he did in order to rescue anybody from danger; he was doing no more than this, assisting the defendants' servant in the defendants' work in pacifying the horse in the field. With the decision in that case, on the proved facts, no one can quarrel; it was absolutely and entirely right; but observations made, both by Scrutton L.J. and Slesser L.J., give occasion to some difficulty. Scrutton L.J. said this (4):

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(1) 43 N. Y. 502.

(2) [1924] 1 K. B. 548.

(3) [1933] 2 K. B. 297.

(4) Ibid. 303.

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"I now come to the more serious point in the case. I start with this: A horse bolts along a highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it seems to me that he is not. The damage is the result of the accident. The man who was injured, in running out to stop the horse, must be presumed to know the ordinary consequences of his action, and the ordinary and natural consequence of a man trying to stop a runaway horse is that he may be knocked down and injured. A man is under no duty to run out and stop another person's horse, and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse." That observation is certainly obiter; but, of course, any observation made by Scrutton L.J. is entitled to very great weight, whether it is or is not obiter. In making that observation, however, I do not think Scrutton L.J.'s mind was directed to the circumstances we have here, of somebody running out for the purpose of rescuing or protecting people in danger of being injured by a runaway horse. I think it is expressed, unfortunately, too widely, and has led to a misunderstanding. I agree to this extent, that the mere fact of a spectator running out into the road to stop a runaway horse will not necessarily entitle him to succeed in an action for the consequential damage. All the circumstances must be considered, and if his act is one which everybody would expect from a normally courageous man, doing what he does in order to protect other people, I do not think the observation, if it is intended to cover that case, accurately represents the law of this country. Slesser L.J. preferred to put his judgment on the other principle, that the rule as to novus actus interveniens applied. It obviously did apply in that particular case, but it does not follow that it applies in every case because it applied in that particular case.

I have considered the matter from the point of view of principle, and from that point of view I think it is quite immaterial whether the policeman acted on impulse or whether he acted from a sense of moral duty to do his best to prevent injury to people lawfully using the highway. If it were necessary to find that he acted on impulse, there is ample evidence of that in his own evidence that he did it on the spur of the moment; but I do not think that is essential. I think it would be absurd to say that if a man deliberately incurs a risk he is entitled to less protection than if he acts on a sudden impulse without thinking whether he should do so or not.

A Scottish case, *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (1), was cited to us. Personally I am unable to derive much assistance from that case because the learned judges who gave the majority decision do not agree about the reasons for their decision, and I am not quite satisfied as to the view they took of the facts—whether the plaintiff was endeavouring to protect his fellow workman or whether he was doing what he did in order to protect himself, or whether he was doing what he did in order to save his employers' property. The only assistance I derive from that decision is that it certainly was a case of novus actus interveniens, although it was, whichever way you look at it, the very kind of novus actus interveniens which ought to have been anticipated as a natural and probable consequence of the wrongful act of the defendants' servant. To that extent it helps to a decision in this case.

As to the remaining ground put forward on behalf of the defendants I need only say that the defence of common employment has nothing whatever to do with this case.

On the grounds I have stated I am satisfied that the learned judge's decision was right, and that this appeal must be dismissed.

MAUGHAM L.J. I am of the same opinion. For the reasons already given by my Lord I think the defendants' servant was guilty of negligence in leaving the horses and cart unattended in this particular street at the time in question. With regard to that I shall say little; nor do I think it necessary to add anything with regard to the defences of contributory negligence and common employment with which he has dealt.

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(1) 24 R. 1001.

There are, however, some legal questions of considerable interest, if not difficulty, which arise in the present case, and with those I desire to deal. The case is one of the class which have come to be called " rescue " cases; a matter which has been the subject of a great many decisions in the United States, but, for some reason unknown to me, of quite a small number of decisions in this country. I do not think it would be expedient, even if it were possible, to endeavour in this case to state any general propositions as to the circumstances in which a person who puts himself in peril in attempting to save life or property is entitled to recover damages from the person whose negligence has occasioned the danger. The rescuer in this case is a member of the police force on duty at the time, and at the risk of his life he stopped two runaway horses with a van attached. The street was Paradise Street, Rotherhithe, a crowded part of London; the hour was 4.30 on an August afternoon when the local schools had just been emptied, and, according to the evidence, the street was congested with children. It is not open to doubt that the action of the plaintiff, equally quick, energetic and courageous, was inspired by a desire to save persons in the street, and in particular the numerous children, from injury and possible death. It so happened that his action was successful; he stopped the horses in about fifteen yards, but was himself injured, because one of them slipped and fell on him as he was doing it. Nobody else was hurt. These circumstances are of a special character, and whilst I entertain no doubt as to the learned judge's decision being correct, it does not in my opinion follow that every man who attempts to stop a bolting horse on a highway and is injured in so doing can necessarily recover damages from the negligent owner.

I will endeavour to state the reasons for my decision in the present case. The criticisms of jurists on the Latin terms used in a great number of reported cases may well be, and are, I

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think, well founded; the maxims "novus actus interveniens" and "volenti non fit injuria," and indeed the word "negligence" itself, are vague and uncertain and may easily be misunderstood. This Court, however, is not justified in departing from the well marked out legal roads and in finding a short cut across untrodden fields of law. If novus actus interveniens is understood as meaning an act which in the eye of the law was not being anticipated, and volenti as referring to a volunteer, we shall avoid some of the difficulties which arise from the use of these phrases. We start with the proposition that it is the duty of men in charge of horses on the highway to use reasonable care to prevent injury to others using the highway. For the reasons given by Greer L.J. it was a lack of such reasonable care which justifies the view that the defendants were guilty of legal negligence. In this respect I agree with the statement of Finlay J. in his admirable judgment where he says (1): "I do not doubt that where you have a pair of horses and a van left unattended in the street and the horses run away, that raises a presumption of negligence. It may be rebutted, but it casts an onus upon the owners of the horses and van to show that what happened happened without negligence." Assuming that to be established, we have to see whether the appellants can establish that the plaintiff comes either within the exception applicable to volunteers or comes within the exception derived from the other maxim in which the words "novus actus" appear, the act of the rescuer being so exceptional as to amount to a novus actus. In the present case it is difficult to keep the two contentions altogether separate.

In my opinion the police constable was not in any true sense a volunteer. It is true that he was under no positive legal duty to run out into the street and at the risk of his life to stop two galloping horses; and I quite accept that nobody would have thought of reprimanding him if he had done nothing. It is also true that the primary duty of the police is the prevention of crime and the arrest of criminals; but that is only a part of the duties of the police in London.

(1) [1934] 2 K. B. 245.

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There is a general duty to protect the life and property of the inhabitants; there is a discretionary duty to direct the traffic, to help blind and infirm people to cross the road, and to direct people who have lost their way. I think it is common knowledge that the position of the police in this City has altered as the result of long habit and intercourse between them and the people since the year 1829, when Sir Robert Peel introduced his celebrated measure; so that the police are now regarded as the friends of the inhabitants whilst engaged in lawful avocations. In my opinion they are not mere lookers-on when an accident takes place, or seems likely to take place; they have, I think, a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street, if they are in a position to do so. At any rate, they have a moral duty to intervene in such a case as the present where it appeared, and rightly appeared, to the plaintiff that there was a reasonable chance of preventing a most serious accident. In deciding whether such a rescuer is justified in putting himself into a position of such great peril, the law has to measure the interests which he sought to protect and the other interests involved. We have all heard of the reasonable man whom the law postulates in certain circumstances; the reasonable man here must be endowed with qualities of energy and courage, and he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when in peril. So regarded, the present plaintiff was not acting unreasonably in the risks he took; there was no such voluntary assumption of risk, to use Professor Goodhart's phrase in the article which has been referred to by my Lord, as would bring him within the exceptions under consideration.

I pause to say here that I agree with my Lord that the judgment of Scrutton L.J. in *Cutler* v. *United Dairies (London), Ld.* (1), has been misunderstood. When the learned Lord Justice made the remark which has been quoted (2), beginning with the words, "A horse bolts along a highway, and a spectator runs out to stop it and is injured," I do not think he was expressing an opinion as to every horse on every highway and every spectator; all I think he meant to say was that the mere fact that a spectator runs out to stop a runaway horse is not sufficient to establish the proposition that he is entitled to sue the person whose negligence caused the horse to run away. If his dictum is understood in that sense, for my part I agree with it. For example, one may imagine a horse bolting on a desolate country highway, as does happen sometimes; he would ultimately get tired and stop and graze by the side of the road without injuring anybody; if a person rushed out in those circumstances and was injured he might well not be entitled to a legal remedy against the negligent owner.

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(1) [1933] 2 K. B. 297.

(2) Ibid. 303.

The second alleged exception, namely, that founded on novus actus interveniens, leads, I think, to this question: In law was the negligence of the defendant the proximate cause of the injury to the plaintiff? That is as good a phrase as one can use, although I do not think that any such phrase can be used without serious objection. I shall not attempt to analyse the meaning of the phrase "legal proximity of causation." It seems to me sufficient to say, as the learned judge said in the Court below (1): "It seems to me that if horses run away it must be quite obviously contemplated that people are likely to be knocked down. It must also, I think, be contemplated that persons will attempt to stop the horses and try to prevent injury to life or limb." Then he cited from the judgment of an eminent American judge, Cardozo J., a sentence with which I agree; and finally the learned judge cited a passage from Sir Frederick Pollock's Law of Torts, 13th ed., p. 498, which I think will command universal assent: "The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue." I will add that I agree with Slesser L.J.'s dictum in *Cutler's* case (2) with reference to the father who, seeing his child in great peril, dashes out and holds a runaway horse's head in order to save his child, and I agree also with the decision of Swift J. in *Brandon* v. *Osborne Garrett & Co.* (1), which has been referred to by my Lord. My decision in the present case is not based on the view that the plaintiff acted instinctively, and I would observe that Swift J. never laid down as a proposition that there must be an instinctive action by the plaintiff before he can bring himself within the protection of the law. In Salmond on Torts, 7th ed., p. 38, occurs this passage: "The danger must be imminent and the plaintiff must have had but a short interval in which to grasp the situation. He must not have time to think. If his action was deliberate, even though rapid, it will be a novus actus interveniens, and his error, not that of the defendant, will be held to be the cause of the accident." If that is intended to be a general proposition and to apply to such a case as the present, in my opinion it is wrong, and it is not supported by anything which fell from Swift J. in *Brandon* v. *Osborne Garrett & Co.* (1) If you imagine a man in danger of drowning owing to the negligent management of a boat, and two persons are looking on, is it to be said that the man who jumps in immediately and tries to save the person struggling in the water has a right of action if he suffers injury, but that the man who thinks over all the circumstances and then, perhaps with even greater bravery, determines to attempt to save life, is to be regarded as not being within the protection of the law? That would be a very strange doctrine.

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(1) [1934] 2 K. B. 247.

(2) [1933] 2 K. B. 306.

To avoid misconception, I wish to repeat that I am not expressing the opinion that if the plaintiff here had been a layman, instead of a policeman on duty, the result would necessarily have been otherwise; that question does not arise. My present view is that a rescuer, who acts on such a moral compulsion that having regard to his powers and his opportunities he would feel disgraced if he merely stood by, would be entitled to succeed in such an action as this; but that is only my present view, and the point does not now arise for decision.

(1) [1924] 1 K. B. 548.

In conclusion I wish to cite a passage from the judgment of Cockburn C.J. in *Scaramanga & Co.* v. *Stamp* (1), where he observes: "The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences." The underlying principle is not, I think, confined to cases of maritime perils.

ROCHE L.J. I agree that this appeal should be dismissed. I should be content to base my decision on the reasoning of Finlay J. in his excellent judgment and of the learned Lords Justices who have given judgment to-day; but having regard to the interest and importance of the case I desire to add a few observations.

As to the finding of negligence on the part of the defendants' servant, it was laid down in *Lynch* v. *Nurdin* (2) by Lord Denman C.J. in 1841, in considering an accident happening by reason of a cart being left unattended in a street, as follows (3): "It is then a matter strictly within the province of a jury deciding on the circumstances of each case. They would naturally enquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear or thronged with a noisy multitude; especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established." It has been recognized ever since that the principles which should be considered by a jury, and also by a judge if he is trying the case alone, are there rightly laid down. The case also shows that the nature and the actions, both of children and drivers of carts, have not altered very much in the ninety-three years which have elapsed since the decision in *Lynch* v. *Nurdin.* (1) Those principles have been correctly applied by the learned judge, and in my judgment there was ample material both on the point of the horses being left unattended and the absence of satisfactory explanation of that fact, and also by reason of the facts relating to the non-application of the drag or chain to the wheel, or, as an alternative, to the fact that it came adrift if it were applied, which justified, and indeed demanded, the decision at which the learned judge arrived.

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(1) (1880) 5 C. P. D. 295, 304.

(2) 1 Q. B. 29.

(3) Ibid. 38.

With regard to the point that there was a new or intervening circumstance which broke the chain of causation between the negligence of the defendant and the accident to the plaintiff, the question essentially is: Was the negligence which has been established the cause of the accident? As I think Lord Sumner once said: It is perhaps as well to put the emphasis on the word "the." My answer is this: that the learned judge rightly arrived at an affirmative conclusion, because the negligence of the defendants' servant was the cause, and not merely the occasion, both of the horses running away and of the necessity arising for the very proper intervention of the plaintiff.

As to the defence which was raised that the plaintiff was unable to recover by reason of the application of the maxim "volenti non fit injuria," in my opinion there was no evidence on which it could properly be held that the plaintiff assented or agreed to bear the risk in question. All the plaintiff knew was that two heavy cart-horses attached to a large van were running away in a crowded street, and that at any rate one woman and a number of children were in great peril; moved, as I think, by a duty both legal and moral—and, I respectfully agree with everything which fell from Maugham L.J. in regard to the duties and position of the police—moved by such a duty, and not from any choice involving a

(1) 1 Q. B. 29.

consent to take any risk upon himself, the plaintiff acted and sustained his injuries. He knew nothing of what had been done or by whom, and there was no material for choice or consent such as is contemplated and required by the maxim in question.

I further desire to add a few observations in the same sense as those which have fallen from the Lords Justices upon *Cutler's* case. (1) Upon the actual decision of the Court of Appeal in that case it is neither proper nor profitable to comment; it is sufficient to say that the facts in that case were entirely different from the facts in this case. The horse there in question was not at the material time running away and was not upon a highway, but had come to a stop in an enclosed field and had apparently ceased to be a danger, when the plaintiff was moved by a request from the driver to render him assistance in its management. There are dicta of two of the Lords Justices as to matters which might occur upon a highway which have been thought not to be entirely in harmony with one another, and to have a wider application than I think they have; at any rate, they form no part of the actual decision. The dictum of Scrutton L.J. does not necessarily relate to a case on a highway where danger from a runaway horse is obvious and imminent. Properly understood, I think it is an illustration relevant to the case under consideration rather than an enunciation of a wider principle. If, however, his dictum is to be taken as laying down any general principle, I desire to reserve consideration of its weight until a case with those particular facts arises for decision. As to the dictum of Slesser L.J., the actual illustration given is one of a rescue due to parental affection. If it is sought to base upon that illustration an inference that the right of action is limited to such a case, this dictum also would, in my judgment, require further consideration. There would then have to be considered the decisions of the American Courts in favour of extending this doctrine, as to which see the observations of Cardozo J. in *Wagner* v. *International Ry. Co.* (2) There

(1) [1933] 2 K. B. 297.

(2) (1921) 232 N. Y. 176.

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would also fall to be considered statements of principle such as those of Lord Atkin in *Donoghue* v. *Stevenson.* (1)

As I have already said, I am of opinion that Finlay J.'s judgment was correct on all points, and therefore I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *William Hurd & Son.*
Solicitors for respondent: *Ponsford & Devenish.*

J. S. H.

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Landlord and Tenant—Houses erected by Local Authority with aid of Government Subsidy—Special Conditions of Tenancy—Houses of same type in same Area—Right to differentiate rents according to means of Tenants—Housing (Financial Provisions) Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 35), *s.* 2; *s.* 3, *sub-ss.* 1, 3, 4—*Housing Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 14), *s.* 67.

Where a local authority erect houses for the working classes with the aid of additional contributions provided by the Government under the Housing (Financial Provisions) Act, 1924, it is competent to them in fixing the amount of the rents to be paid for houses of the same type in the same area to discriminate according to the means of the particular tenants, provided that in so doing they observe the provision in sub-cl. (*e*) of sub-s. 1 of s. 3 of the Act, that "the rents charged in respect of the houses shall not in the aggregate exceed the total amount of the rents that would be payable if the houses were let at the appropriate normal rents charged in respect of working-class houses erected prior to the third day of August, 1914."

APPEAL from an order for possession made by the judge of the Leeds County Court.

The following statement of facts is taken substantially from the judgment of the Master of the Rolls.

The action was brought by the Leeds Corporation to recover possession of a house which had been let by them to the defendant. The relationship of landlord and tenant had been clearly and definitely established. The defendant had occupied the premises for a considerable time and had paid rent, and there was no question at all that there was a tenancy. On April 6, 1934, notice to quit was served on the defendant which expired on April 16 following, but the defendant did not surrender possession of the premises to the plaintiffs. Thereupon, this action was brought to recover possession and arrears of rent at the rate of 9*s.* 8*d.* a week from April 2 down to April 16, when the rent had not been paid and thereafter mesne profits at the rate of 13*s.* 11*d.* per week.

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(1) [1932] A. C. 562, 580.

The defendant did not contest any of those facts nor, indeed, the right to retake possession upon the notice to quit expiring. He took the point that the plaintiffs, who were a public body, were not entitled to serve a notice to quit and, therefore, to determine the contract of tenancy under which he occupied the premises, and that the plaintiffs were disabled from serving that notice to quit by reason of the terms of the Housing (Financial Provisions) Act, 1924. (1) He argued that the plaintiffs had manifested, in two resolutions which were passed and pursuant to which the notice to quit was served, that they were acting in a way in which they were not entitled to act under the powers which were entrusted to them under the Housing Acts.

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(1) Housing (Financial Provisions) Act, 1924, s. 3, sub-s. 1: "Houses provided by a local authority themselves shall be deemed to be subject to special conditions if the local authority undertake, in accordance with rules made by the Minister and approved by the Treasury, that the following conditions will be complied with in relation to the houses: . . . .

. . . .

(*e*) that the rents charged in respect of the houses shall not in the aggregate exceed the total amount of the rents that would be payable if the houses were let at the appropriate normal rents charged in respect of working-class houses erected prior to the third day of August, 1914, ... and

(*f*) that reasonable preference shall be given to large families in letting the houses."

Sub-s. 3: "For the purposes of this section, the appropriate normal rent shall be deemed to be such rent, exclusive of rates, as the local authority determine, in accordance with rules made by the Minister, to be the rent that is normally charged in the area of the local authority in the case of working-class houses erected prior to the third day of August, 1914: Provided that different rents may be so determined to be the appropriate normal rents as respects different classes of houses and as respects different parts of the area . . . ."

The first of the resolutions was passed on January 19, by which it was " Resolved (*a*) That as from the 2nd April, 1934, except as hereinafter provided, the rent, exclusive of rates and water charges, to be paid by tenants of houses and flats erected by the Council under the Housing, etc., Act, 1923, the Housing (Financial Provisions) Act, 1924, and the Housing Act, 1930, shall be the average economic rent of each type of house and flat erected under the Act in question as estimated by the City Treasurer on the 1st April in each year, and that all previous resolutions relating to rents of houses and flats erected under such Acts be varied accordingly. (*b*) That public assistance in the way of rent relief be granted to all tenants applying for the same and adjudged to be in need and that such assistance be reviewed at half-yearly intervals and on any change of circumstances of the tenant. (*c*) That in determining the amount of such relief the following amounts of weekly income be regarded as necessary before any change is made." Then a table of figures was given. " In assessing the family income 5*s*. in the case of each person at work shall not be taken into account."

The second resolution was passed on February 16 and by it it was " Resolved (*a*) That in future all additional amenity rents be abolished, except a charge of not exceeding 3*d*. per week in respect of large gardens. (*b*) That the rent, exclusive of rates and water charges, payable on the 2nd April, 1934, and thereafter during the ensuing year by tenants of houses and flats erected by the Corporation under the Housing Acts in question be as follows," and a table is then set out. In reference to A2 houses, which was the quality of house occupied by the defendant, the rent was to be 10*s*. instead of, as it had previously been, a rent of 5*s*. 6*d*.

Thereupon, on April 6 " The Town Clerk reported as to matters arising in connection with the tenancies of certain houses and flats on the Corporation Housing Estates and instructions were given him to serve notices to quit and to take the necessary proceedings to recover possession in all cases where tenants have refused to pay the rents fixed in accordance with the resolutions of the 19th January and 16th February last."

The defendant alleged that it was plain from those resolutions that the purpose for which this notice to quit was served was that of carrying out a policy of the plaintiffs whereby public assistance, in the way of rent relief, should be granted to certain tenants who applied for the same and who were adjudged to be in need; that the notice to quit was not served in the ordinary course as between landlord and tenant, that it was served by these particular landlords, who were subject to statutory limitations and statutory duties, for the purpose of carrying out a policy of relief or public assistance by way of rent relief which was alien to the powers and duties possessed by the Corporation.

The documents which were put in evidence revealed the facts, and there was no dispute as to the general facts of the case. A notice was served upon the defendant in February, as follows: "I am directed to inform you that the housing committee have decided that the rent," and so on, "shall . . . . be the average economic rent of each house." That was pursuant to the resolution. Then "That public assistance in the way of relief shall be granted," and so on. "Unless you are desirous of applying for rent relief in accordance with paragraph (*b*) the rent payable by you on 2nd April next will be the sum of 10*s.* per week in addition to rates and water charges (which at present amount to 3*s.* 10*d.* per week) in respect of additional garden space." He was then sent a notice on which he could ask for rent relief, and that notice was in its material terms as follows: "The income of my household not being sufficient to enable me to pay the above-mentioned rent, I hereby apply for assistance from the housing subsidy pool, and declare that the undermentioned particulars are a full and accurate statement." It was that notice which the defendant declined to answer, but he asked certain questions of the housing committee which were embodied in a letter or memorandum of March 14, the third of which was: "What are the component parts of the rent pool?" Ultimately he received an answer on April 6: "The component parts of the rent relief pool are the Government contribution under the Acts concerned, plus the appropriate municipal contribution."

It was stated in the Court of Appeal that at the particular time when this notice was sent out or when it was decided that it should be sent out, the amount standing in the pool was a sum of 5000*l.* and it was from that source that the rent relief could be given to those persons who filled up the form and applied for it.

The question raised by the action was whether under the powers of the Housing (Financial Provisions) Act, 1924, the Corporation could discriminate, according to the means of the tenants, with regard to the rents to be paid for houses of the same type in the same area.

The county court judge held that the Corporation had power to do so.

The tenant appealed. The appeal was heard on October 5, 1934.

Comyns Carr K.C. and *G. R. Hinchcliffe* for the appellant.

Montgomery K.C. and *D. O. McKee* for the respondents.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. [stated the facts as above set out and continued]: The contention on the part of the defendant is that the plaintiffs have misconstrued and misused their powers, and have acted ultra vires. It therefore becomes necessary to consider what were their powers. The chief point made by the defendant is that if attention is paid to the Act of 1924, s. 3, sub-s. 1 (*e*), it will be seen that the conduct of the plaintiffs falls outside their statutory powers.

For the purpose of making this matter plain it is, I think, necessary to say a few general words about the Housing Acts. In 1890 there was passed the Housing of the Working Classes Act. That Act was, broadly speaking, an Act under which an opportunity was given to local authorities, by adopting those clauses and those powers, of providing housing for the working classes. By a later Act of 1909, the powers which were given by the Act of 1890 could be put into operation at the instance of persons who made a representation to the Local Government Board that there was a need of housing and that the occasion had arisen whereby it was important that the powers of the earlier Act should be exercised in relation to the area where the complaint was made.

These Acts—and there are several of them—were all consolidated in the Housing Act, 1925, and that Act, by s. 57, consolidated sections which were ss. 53, 56 and 59 of the Act of 1890, s. 1 of the Act of 1900 and s. 50 of the Housing and Town Planning Act, 1909. In s. 57 of the Act of 1925 it is provided that a local authority may provide housing accommodation for the working classes by the erection of dwelling-houses, by the conversion of any buildings, by acquiring houses, by altering, enlarging, repairing, or improving houses. They were also, by s. 67, sub-s. 1, of this Consolidation Act, given the power of management, which was as follows: "The general management, regulation, and control of the dwelling-houses provided by a local authority . . . . shall be vested in and exercised by the local authority." Sub-s. 2 says: "The local authority may make such reasonable charges for the tenancy or occupation of the dwelling-houses so provided as they may by regulations determine." That reproduced s. 61 of the Act of 1890. Thus at the time when the Consolidation Act was passed, the various powers which had existed before were collected and, shortly put, the local authority had the power to provide housing accommodation for the working classes, the general management of those houses was vested in the local authority, and they were empowered to make reasonable charges for the tenancy or occupation of the dwelling-houses. I pause there for a moment to note what is plain from the series of Acts, that the first purpose was to secure the better housing of the working classes, to prevent their being compelled to live in slum areas, and that the working man should have an opportunity of getting, at a reasonable rent, accommodation which, up to that time and until these Acts had been passed and

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put into force, had, in many areas, not been available to them.

In 1923 the Housing, etc., Act, 1923, was passed, for a somewhat different purpose. It was an amending Act, and it contained a provision that there should be in respect of the accommodation provided by the local authority, in effect, a subsidy, and that was enlarged by the Act of 1924. This subsidy was ancillary to the general powers given by the series of Acts to which I have referred. The Act of 1924, by s. 2, provided for increased Government contributions in case of houses which were subject to special conditions, and by s. 3, sub-s. 1: "Houses provided by a local authority themselves shall be deemed to be subject to special conditions if the local authority undertake, in accordance with rules made by the Minister and approved by the Treasury, that the following conditions will be complied with in relation to the houses."

I turn for a moment to look at the Rules of 1924 (No. 1362), which by r. 2 provide: "The local authority shall obtain particulars of the current rents of working-class houses of all types erected in their district before the 3rd day of August, 1914, in such numbers and proportions as are, in their opinion, fairly representative of all those houses in the district: Provided that (i) for this purpose parlour and non-parlour houses shall be treated as separate classes; and (ii) if there are substantial differences in the rents payable in respect of houses in different parts of the area having similar accommodation, each of such parts shall for this purpose be treated as a separate area and appropriate normal rents shall be ascertained in respect of the houses in each of such parts accordingly." Then r. 3: "The appropriate normal rent for each of the two classes of houses in the area or any part of the area, as the case may be, shall be the average rent payable in respect of the houses of that class of which particulars have been obtained."

It is contended that by virtue of those rules there was intended to be a uniform rent charged for the houses and obtained from the tenants according to a standard which is to be measured by what had been the rents of particular types of houses before August 3, 1914, and emphasis is placed upon s. 3, sub-s. 1 (*e*), of the Act of 1924, which says: "that the rents charged in respect of the houses shall not in the aggregate exceed the total amount of the rents that would be payable if the houses were let at the appropriate normal rents charged in respect of working-class houses erected prior to the third day of August, 1914, except where the estimated annual expenses to be incurred in connection with the houses exceed . . . . an amount equivalent to four pounds ten shillings a year payable for a period of forty years . . . ."

It is said that when you look at those clauses to which I have referred (and there are one or two others to which I will not trouble to refer) you find that the system under which the local authority are to act provides for a normal rent determined in relation to the rents of houses of the same class before August 3, 1914, and that it is a misuse altogether of the fund which is derived from the subsidy made by the Central Authority and to which a contribution is made by the local authority, that you should use it as a sort of pool to enable you to give rent relief to certain classes of persons. It is said that if you did so you would offend against the terms of this sub-cl. (*e*) because you would be exceeding the aggregate; that the aggregate clearly indicates what is to be the measure of rents which are recoverable in respect of the premises, and that a pool used as for eleemosynary purposes is wholly alien from the purpose and scheme of the Act. Now I do not so read sub-cl. (*e*). It appears to me that the houses which are provided are to be subject to certain conditions and rules, but the local authority themselves are not to make charges in respect of the houses so that the aggregate exceeds the total amount of rents which should be payable if the rents had been based upon the rents before August 3, 1914: in other words, sub-cl. (*e*) seems to prevent the possibility of the local authority, under pressure from population, or otherwise, making any profit or exacting any total beyond a certain sum. It seems to me to tie the hands of the local authority to this extent, that they must

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not in any circumstances make a profit: of course, it would not be in their hands a profit, but they must not obtain an excess beyond a certain standard. I daresay it would be quite possible to obtain such an excess where the population is large and the need for houses is great, but the purpose of this sub-section is to prevent anything of the sort. But when one turns to look at the sections to which I have referred and recalls the fact that there is a power on the part of the local authority to provide accommodation and a power, under s. 67 of the Act of 1925, whereby they exercise general management, and are to make reasonable charges for tenancy or occupation, it seems to me it is a matter for the discretion of the local authority to determine what are those reasonable charges that they make for the tenancy and occupation of the houses. Well, says Mr. Comyns Carr, in a very lucid argument, that may be so; but you cannot differentiate between particular tenants or particular persons, between those who are ready to accept and those who are unwilling to accept the relief which they can claim on the form sent to them.

Mr. Montgomery answers that by pointing out that in this very sub-s. 1 of s. 3 of the Act of 1924, clause (*f*) provides "that reasonable preference shall be given to large families in letting the houses." What preference? It does not indicate how the preference is to be given. All that is said is that it must be reasonable, and whether the preference is in priority of tenants, or whether it is a preference in the matter of rent, is nowhere defined, but that reasonable preference may be given is a clear indication that the strict rule as between all persons occupying these houses of the same class is not in all cases to be observed. The very word "aggregate" in s. 3 of the Act of 1924 to my mind is used to indicate that although there may be a contribution A from one group of houses, a contribution B from another group of houses and a contribution C from another group of houses, you may take the whole of those contributions together to find the aggregate and the component parts of the aggregate need not necessarily be equal.

One case was referred to, and it is a useful one, namely, *Short* v. *Poole Corporation* (1), where the Court had to consider what sort of limitations were to be placed on the statutory powers entrusted to, in that case, an education authority. According to the judgment (2) if the exercise of those powers is to be challenged and is to be impugned as ultra vires, then the test that must be applied is that they are unreasonably exercised, that they are used in bad faith. Now there is here no such suggestion. If adequate accommodation is to be found for the working classes, if the general purpose of the whole scheme of the Acts is recognized and kept in mind, it would seem not unreasonable that there should be a recognition of certain difficulties which may beset particular workers or a particular area, and which ought to be met by a differentiation in the conditions under which the tenancies are granted, and the words of Lord Sumner, which are quoted in the case I have just mentioned (3), are, to my mind, germane to the present case. If those powers are not exercised improperly, in the sense that they are for a collateral or alien purpose, it would seem that they cannot be impugned as being ultra vires, for a certain discretion ought to be given, and certainly is not excluded under the two sections to which I have referred, s. 57 and s. 67 of the Act of 1925. The clauses that are found in the Housing (Financial Provisions) Act, 1924, seem appropriate to prevent the local authority who are receiving the subsidy from using that subsidy in any way which would inure to the benefit of the rates or from making a profit which would relieve them of the responsibility which they are under of providing houses; but they are not designed to curtail or to circumscribe the ordinary powers of management which are entrusted generally to the local authority under the Acts which stand apart from these financial provisions in the Act of 1924.

For these reasons, I am of opinion that the learned county court judge came to a right decision, and that this appeal ought to be dismissed with costs.

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(1) [1926] Ch. 66.

(2) Ibid. 87.

(3) Ibid. 88.

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ROMER L.J. I have arrived at the same conclusion. It is plain that Mr. Comyns Carr cannot succeed on this appeal unless he can satisfy the Court that the notice served on his client by the Leeds Corporation, determining his client's tenancy, was served ultra vires the corporation. Mr. Comyns Carr says that the notice was ultra vires because it was served for the purpose of compelling the defendant to pay a rent for his house in excess of the rent the corporation were lawfully entitled to charge under the provisions of the Housing (Financial Provisions) Act, 1924. In the first place, it is to be observed that that Act does not authorize the charging by the corporation of any rents at all. The power of the corporation to build the houses, to let them and to fix the rents to be charged in respect of them is treated, by the Act of 1924, as being already in existence, as, indeed, it was under the Housing of the Working Classes Act, 1890, and those which succeeded it and had been passed up to 1924. What the Act of 1924 did was this, and, for the purposes of this case, I may say this only: Where, in pursuance of those existing powers, a corporation such as this did erect houses for the working classes, then if it subjected those houses to certain conditions, the subsidy which the Minister of Health was authorized to pay to the corporation under the Act of 1923 in respect of the building of the houses was to be in excess of the subsidy fixed by that earlier Act and should be the larger subsidy fixed by the Act of 1924. Sect. 2, sub-s. 1, of the Act of 1924 merely said: "Where, in pursuance of proposals approved by the Minister after the passing of this Act, any houses are provided by a local authority"—which means, of course, in pursuance of already existing powers; I am leaving out immaterial words—"then, if the houses are subject to special conditions as hereinafter provided in this Act, the contribution which the Minister may make or undertake to make in respect of each such house, instead of being a contribution of six pounds payable annually for a period of twenty years"—that was the rate of contribution, as I understand it, fixed by the Act of 1923—shall be this larger contribution as specified. Sect. 3, sub-s. 1, says: "Houses provided by a local authority themselves shall be deemed to be subject to special conditions if the local authority undertake, in accordance with rules made by the Minister and approved by the Treasury, that the following conditions will be complied with in relation to the houses," and then the conditions are set out. But it is to be observed that no corporation or local authority who erected houses for the benefit of the working classes were obliged to subject them to those conditions and to enter into the specified undertaking. If they break the undertaking after they have entered into it and so subjected the houses to conditions, then it would appear that the Minister, by virtue of sub-s. 4 of s. 3 may thereupon, in consequence of the breach of the undertaking, determine or reduce the payment of the subsidy, although he may possibly—I express no concluded view about it—have some right against the corporation other than that in respect of the breach by them of their undertaking. There is nothing, either in the Act or in law, to suggest that a tenant can take advantage of the breach of undertaking by the corporation or in any way sue them in respect of such breach or threatened breach. But apart from that altogether, it appears to me that here the corporation are not threatening to commit any breach of the undertaking at all. The undertaking which it is said they are threatening to break is the one that is set out in sub-cl. (*e*) of sub-s. 1 of s. 3 of the Act, and it is in these terms: " that the rents charged in respect of the houses shall not in the aggregate exceed the total amount of the rents that would be payable if the houses were let at the appropriate normal rents charged in respect of working-class houses erected prior to the third day of August, 1914." I need not read the exception. That must be read in connection with sub-s. 3, which says: " For the purposes of this section, the appropriate normal rent shall be deemed to be such rent, exclusive of rates, as the local authority determine, in accordance with rules made by the Minister, to be the rent that is normally charged in the area of the local authority in the case of working-class houses erected prior to the third day of August, 1914."

If the sub-section had ended there, obviously many difficulties would arise, because the rent normally charged in the area of the local authority, in the case of working-class houses erected prior to August 3, 1914, would necessarily differ, and differ largely, according to the type of house in respect of which the rent was being charged and according to the area or district in which the house might be situated. It was to meet that difficulty that sub-s. 3 goes on as follows: " Provided that different rents may be so determined to be the appropriate normal rents as respects different classes of houses and as respects different parts of the area." In view of those words, sub-cl. (*e*) of sub-s. 1, s. 3, is to be read as follows: that the rents charged in respect of the houses of a particular class in a particular area shall not in the aggregate exceed the total amount of the rents that would be payable if the houses were let at the appropriate normal rents charged in respect of working-class houses of that class and in that area erected prior to August 3, 1914.

In my opinion, sub-s. 3 throws no further light upon the meaning of sub-cl. (*e*) and in no way cuts down or modifies the express words used in that sub-section: " shall not in the aggregate exceed ".

In the present case I am not sure that it has been proved, but we may take it that it is admitted, that the particular higher rent which the corporation are seeking to obtain from the defendant is a rent which does exceed the rent that would be the normal rent charged in respect of a house of that class and in that area prior to August 3, 1914; but it is also clear that the aggregate total of the rents which the corporation are proposing to charge in respect of all the houses of that particular class in that particular area will not exceed the amount specified in sub-cl. (*e*). That being so it appears to me impossible to say that the action of the corporation in discriminating between one house and another of the same class in the same area, to the extent of charging more in respect of one house than in respect of another, is ultra vires or is a breach of their undertaking. It appears to be a course of action expressly authorized and contemplated by the undertaking.

For these reasons, it appears to me that the defendant has failed to show that the service by the corporation of a notice to quit was in any sense ultra vires the corporation, and that being so, there is no defence to this action and the appeal fails and must be dismissed with costs.

GODDARD J. I agree. I only add a few words because we are differing in one respect from the learned county court judge. Although he held that the defence failed, he did hold that the Act did not authorize any differentiation on the ground of the means of the tenant of the house. The Master of the Rolls and Romer L.J. have dealt with the construction of sub-cl. (*e*), sub-s. 1, s. 3, of the Act. Mr. Comyns Carr asks us to read it as though it provided that the rent charged in respect of each house of a particular class in a particular district was not to exceed the pre-war rent of a house of that class in that district. That is not what the Act says. The Act, as I read it, says that the total rent roll from a particular class of house in a particular area is not to exceed what it would have been on the 1914 standard, and subject to that, it seems to me the corporation could fix the rents as they choose.

The Master of the Rolls has pointed out what is the object of this legislation. It is to provide houses for the classes of the community who cannot afford to pay economic rents; but the object of the Act is not to provide subsidized houses for people who can afford to pay economic rents. It seems to me that all the corporation are doing by this plan is to see that persons who can afford to pay economic rents for these houses shall pay them, which will enable them, of course, to make greater concessions in the rents to persons who cannot afford to pay economic rents. It seems to me quite clear that the words in this sub-clause authorize what has been done here, but even if it were not so the defence would equally fail, because if the corporation's scheme were to offend against or to break the conditions which are imposed

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by the Housing Act of 1924, it would be within the power of the Minister, if he thought fit, to withdraw or to reduce the amount of the contribution or subsidy which is made to the corporation. That seems to me to be the only result that would follow, and I am quite content upon that part of the case to adopt the reasoning of the learned county court judge's judgment.

Upon these grounds I think the appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Stafford Clark & Co., for Simpson, Curtis & Burrill, Leeds.*

Solicitors for respondents: *King, Wigg & Brightman, for the Town Clerk, Leeds.*

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STOKES *v.* LITTLE.

Landlord and Tenant—Rent Restriction Acts—House to which Acts had ceased to apply before July 18, 1933*—Non-registration within three months after that date—Certificate of County Court that there was reasonable excuse—Effect of application to register—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2*—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 2, 5.

In 1923 the plaintiff purchased a dwelling-house in the Metropolitan police district of a rateable value of 13*l.* per annum, the standard rent being 8*s.* 6*d.* a week. On October 10, 1932, she came into possession of the whole of the dwelling-house (which thereupon became decontrolled by virtue of s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923). She let the dwelling-house to the defendant from November 5, 1932, on a weekly tenancy at an agreed rent of 25*s.* a week.

On July 18, 1933, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was passed. The plaintiff failed to register the dwelling-house under s. 2 of that Act within three months, but subsequently obtained from the county court a certificate that there was reasonable excuse for the failure to register. Application for registration in pursuance of the certificate was made in January, 1934 :—

Held, by the Court of Appeal, that where an application for registration was made in pursuance of a certificate of the county court, the effect was to place the house, as from that date, in the same position as though it had been registered within three months, and that the landlord suffered no further detriment through the delay than such as might result from the application of the Act of 1933 between July 18, 1933, and the application to register.

APPEAL from Bow County Court.

In 1923 the plaintiff, Miss Bertha Sarah Whitmarsh Stokes, purchased a dwelling-house, 82 Huddlestone Road, Leytonstone, in the Metropolitan police district. The rateable value of the house was 13*l.* per annum, and the standard rent 8*s.* 6*d.* a week. On October 10, 1932, Miss Stokes came into possession of the whole of the dwelling-house, to which the Rent Restriction Acts (in this report referred to as " the Acts ") thereupon ceased to apply by virtue of s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923. (1) She let the dwelling-house to the defendant Leonard James Little from November 5, 1932, on a weekly tenancy at an agreed rent of 25*s.* a week.

(1) The Rent and Mortgage Interest Restrictions Act, 1923 (passed on July 31, 1923) :—

Sect. 2, sub-s. 1 : " Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . . ."

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (passed on July 18, 1933) :—

Sect. 1 exempts from the operation of the principal Acts " any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed—(*a*) in the Metropolitan police district or the City of London forty-five pounds."

Sect. 2, sub-s. 1 : " Subject as hereinafter provided, section two of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to any dwelling-house of which the rateable value

On July 18, 1933, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was passed. The plaintiff failed to register the dwelling-house under s. 2 of that Act within three months, but subsequently obtained from the county court a

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on the appointed day did not exceed (*a*) in the Metropolitan police district or the City of London, twenty pounds; . . . ."

Sub-s. 2: "If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in the last foregoing subsection, claims that by virtue of the provisions of the said section two of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within three months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house, and if in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, such a dwelling-house as aforesaid, it is proved that but for the provisions of the said section two of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply:

Provided that if, on application to the county court of the district in which the house is situated, the court certifies that there was reasonable excuse for the failure to make application for the registration of the dwelling-house within the time aforesaid and application for registration is made within seven days after the certificate has been granted, then, if the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, section two of the Act of 1923 shall, notwithstanding anything in the last foregoing sub-section, apply to the dwelling-house as from the date on which the application for registration is made."

Sub-s. 5: "If in any proceedings the court determines that any dwelling-house registered under this section is a dwelling-house to which the principal Acts apply, it shall be the duty of the registrar or clerk of the court to inform the council by whom the dwelling-house was registered, and, upon being so informed, that council shall forthwith cancel the registration of the dwelling-house, so, however, that the registration shall be restored if the decision of that court is reversed on appeal:

Provided that this subsection shall not apply to any dwelling-house with respect to which a certificate has been granted under subsection (2) of this section, unless the court has determined that the principal Acts had not ceased to apply to the dwelling-house before the passing of this Act."

certificate that there was reasonable excuse for the failure to make application for registration. Application for registration was made by the plaintiff in pursuance of the certificate in January, 1934.

In an action by the plaintiff in the Bow County Court for arrears of rent at the rate of 25*s.* a week from September 24, 1933, the defendant alleged that the dwelling-house was at all material times subject to the Acts by virtue of s. 2 of the Act of 1933. He counterclaimed for the return of rent overpaid in excess of the standard rent, or, alternatively, in excess of the standard rent plus the permitted increases.

The plaintiff contended that the effect of the application for registration under the certificate of the county court was that as from the date of that application s. 2 of the Act of 1923 operated to decontrol the house as though the Act of 1933 had not been passed.

The defendant contended that the effect of registration under a certificate of the county court was not to decontrol the house, so far as the existing tenancy was concerned, but only to give the landlord the right to decontrol it, if and when he again came into possession of the whole house.

The county court judge gave judgment for the defendant, and the plaintiff appealed.

Casswell for appellant. Under s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, houses could be decontrolled—(*a*) if let with the use of furniture, or (*b*) if let on a tenancy including service or attendance. By sub-s. 9 of that section the Act did not apply to a dwelling-house erected after or in course of erection on April 2, 1919, or to any dwelling-house which had been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. The next stage was s. 2 of the Act of 1923, whereby the Acts were to cease to apply (*a*) if the landlord was at the passing of the Act in or subsequently came into possession of the whole house, or (*b*) if he granted a lease fulfilling certain specified conditions.

Nothing was said in either of those Acts about any state of recontrol. It was not till the Act of 1933 that anything in the nature of recontrol was introduced. If the respondent's contention is correct as to the effect of registration under a certificate, the Act imposes a very heavy penalty on a landlord for a failure to register in time, for which failure, ex hypothesi, he had reasonable excuse.

[SLESSER L.J. Suppose a house let furnished in 1920 was subsequently let unfurnished, did the Act apply ?]

It would seem so. See *Leslie & Co.* v. *Cumming.* (1)

The Act of 1933 introduced three classes of houses :

(*a*) Houses where the recoverable rent and rateable value exceed, in the Metropolitan police district, 45*l*. If the principal Acts had already ceased to apply to any such house, it remained unaffected. If it was within the Acts down to the passing of the Act of 1933, they ceased to apply, subject to the landlord's obligation to give an existing statutory tenant a notice to quit of not less than one month expiring not earlier than September 29, 1933.

(*b*) Houses of less than 45*l*. rent or rateable value. The principal Acts continued to apply to such houses without change. If already decontrolled, whether under s. 12 of the Act of 1920 or s. 2 of the Act of 1923, they remained decontrolled ; if not, the landlord could decontrol them if he could obtain possession.

But out of this class the Act of 1933 proceeded to carve a third class :—

(*c*) Houses of which the rateable value on April 6, 1931—the rent for this purpose being immaterial—did not exceed 20*l*. in the Metropolitan police district. Those houses could no longer, as from July 18, 1933, be decontrolled by recovery of possession. They might still be decontrolled if they were let furnished, or reconstructed by way of conversion into flats. So far the scheme of the Act was clear, but it was necessary to make provision for those houses of this class to which s. 2 of the Act of 1923 already applied, and which were already decontrolled. That was done by permitting the landlord to register the house with the local authority within three months. If he did so, it would seem that control never reattached. If he failed to do so, then " in any proceedings the dwelling-house shall be deemed to be a dwelling-house to which the principal Acts apply." It is difficult to understand precisely what that means. If it means that " notwithstanding the previous decontrol under s. 2 of the Act of 1923, the principal Acts shall again apply to the dwelling-house as from the passing of this Act " it would have been easy to say so. But whatever the precise consequences of non-registration a locus pœnitentiæ is provided in the proviso for the landlord who may register out of time if a certificate is granted by the county court. Then " s. 2 of the Act of 1923 shall, notwithstanding anything in the last foregoing sub-section, apply to the dwelling-house as from the date on which the application for registration is made." In other words, the certificate followed by an application to register puts the landlord as from the date of the application, in the same position as if he had registered in time.

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(1) [1926] 2 K. B. 417.

Having said that " s. 2 of the Act of 1923 shall . . . . apply to the dwelling-house," it was not necessary to say " the principal Act shall cease to apply " because it would, on the appellant's construction, be ipso facto excluded by s. 2 of the Act of 1923.

Sub-s. 5 of s. 2 of the Act of 1933 is only consistent with the construction submitted by the appellant.

H. C. Leon for respondent. If the appellant is right in saying that when this house was registered it became decontrolled, every house which was decontrolled under s. 2 of the Act of 1923 and is registered under a certificate of the county court becomes decontrolled. But the Act shows that there may be houses to which the Acts can apply after registration.

As from the granting of the certificate the landlord is in a position in which no other landlord of a Class C house can be, unless it has already been decontrolled before the passing of the Act of 1933—namely, at present controlled, but in a position to decontrol in the future. There are three possibilities for the landlord of a Class C house to which the Acts had ceased to apply before July 18, 1933 :—

(*a*) if he registers within three months—decontrol continues, apparently without break ;

(*b*) if he does not register at all, the Acts again apply, and he cannot take the house out of the Acts by getting possession ;

(*c*) if he registers out of time under a certificate, the Acts apply, but he may take the house out of their operation by subsequently getting possession.

That is a much more natural explanation of the expression "s. 2 of the Act of 1923 shall . . . . apply to the dwelling-house." To satisfy that expression it is only necessary to give a right to decontrol in the future. If, as the appellant contends, that is equivalent to saying "the Acts shall cease to apply to the dwelling-house," that would have been a simpler and more accurate way to express it.

The object of the Act was to protect the tenant of a small house, who has a right to suppose that an unregistered house is a controlled house. He may leave another controlled house to go in, and the next day the landlord may apply for registration under a certificate obtained just before the tenancy began. If the appellant is right, the tenant has no protection. It is quite reasonable that the Legislature should say (as, it is submitted, it has said) that if a tenant goes into an unregistered house, he shall be protected.

That contention makes perfect sense of this obscure section, because the words are "s. 2 of the Act of 1923 shall . . . . apply to the dwelling-house as from the date of the application to register." In other words, the landlord is put in the position of the landlord of a controlled house in 1923. He must wait till he gets possession, and then can decontrol the house.

As to sub-s. 5 of s. 2 of the Act of 1933, on the appellant's contention there could not be a house which was decontrolled before July 18, 1933, and was registered pursuant to a certificate and yet was controlled. But this sub-section indicates that there can be such a house. If so, it must be such a house as this.

Casswell in reply.

Cur. adv. vult.

1934. Oct. 17. The following judgments were read :—

LORD WRIGHT. The plaintiff, the appellant, is the owner of a house which she purchased in 1923. On October 10, 1932, she came into possession of the whole of the house, and, accordingly, under s. 2 of the Rent and Mortgage Interest (Restrictions) Act, 1923, the house was thereupon removed from the operation of the Acts. In that state of things she granted a tenancy of the whole house to the respondent, the defendant, at 25*s.* a week. Under the Acts the standard rent would be 8*s.* 6*d.* a week. The rateable value is 13*l.* a year. The house is in the Metropolitan police district.

On July 18, 1933, the Rent and Mortgage Interest Restrictions (Amendment) Act of 1933 was passed. The house came within the category defined in s. 2 of that Act. The plaintiff failed to register on or before October 18, 1933. She did, however, register early in January, 1934, having obtained a certificate from the county court that there was reasonable excuse for her failure to register within the prescribed time. She then brought her action in the county court claiming (inter alia) arrears of rent as at the agreed rate. The respondent counterclaimed for over-paid rent on the basis that he was only liable to pay at the standard rate. The learned county court judge has decided in favour of the defendant. The only question argued at the hearing was the question of the construction of the Act of 1933. What order should follow from the decision of this Court has been left for later discussion.

The question of construction is one of considerable difficulty, as appears from the fact that different county court judges have given conflicting decisions. I have felt considerable doubt both during the argument and while considering the matter, but I have formed, and must state, the best conclusion that I have been able to arrive at on this obscure legislation. That obscurity must be my excuse if I have construed it wrongly. It is impossible to feel confident that the true meaning has been ascertained.

The Act of 1933 by s. 1 removed altogether from the scope of the Acts dwelling-houses of which the relevant rent or

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rateable value amounted to or exceeded 45*l.* or 35*l.*, according to their locality. By s. 2 the Act dealt (inter alia) with dwelling-houses of which the rent or rateable value did not exceed in the Metropolitan police district 20*l.* The house in question falls within that category. Sect. 2 of the Act of 1933 first of all enacts that s. 2 of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to the classes of houses there specified. The effect so far is not only to stop future claims that such houses are entitled to be excluded, but to bring back into the Act subject to the qualifications set out even those houses of the specified rental or rateable values which had been excluded by s. 2 of the Act of 1923 and to abrogate the rights vested in the landlords by that section. This is no doubt a harsh measure, but Parliament which gave can take away. The words " shall not apply " accordingly refer in this way to the past operation of s. 2 of the Act of 1923.

Sect. 2, sub-s. 1, however, is qualified by sub-s. 2, a subsection which is both tortuous and involved. Its provisions, whatever they mean, are limited to any dwelling-house let as a separate dwelling immediately before the passing of the Act of 1933. The plaintiff's house comes within that description. Sub-s. 2, apart from the proviso, seems to fall into two parts. It provides, first of all, that if the landlord of the particular dwelling-house coming within the section claims " that by virtue of the provisions of the said section 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act " he is to apply within three months after the passing of this Act in the prescribed form to the local council for registration of the dwelling-house. The form of application as duly prescribed includes a declaration that the house is one to which the Acts had ceased to apply by virtue of s. 2 of the Act of 1923 and an application for registration accordingly. What result is to follow from this claim and this application is not expressly stated in the subsection, which next proceeds to deal with the case in which no such application has been made within the prescribed three months. In that event "if in any proceedings with respect to any dwelling-house" of the specified description "it is proved that but for the provisions of the said section two of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply." That, no doubt, means that s. 2 of the Act of 1923, though a part of these Acts, is to be excluded. It may be inferred, though it is not expressed, that if in any such proceedings it appears that registration has been made in due time the dwelling-house will be deemed to be a dwelling-house to which the principal Acts do not apply. In other words, that dwelling-house will retain the status which it had acquired under s. 2 of the Act of 1923 and will be unaffected by the Act of 1933. It is not necessary here to decide this point. If, however, there has not been timeous registration, the result is that the landlord will be "deemed" to have lost the privileges which had been vested in him under s. 2 of the Act of 1923, and that, as in the present case, rights duly constituted under a lawful tenancy will be abrogated or reduced by the application of the Acts. This appears a somewhat harsh measure even though the dwelling-house is only to be "deemed," and only to be "deemed" in particular proceedings, to be a house to which the Acts apply, but that is qualified as being "subject as hereinafter provided." It would seem from these words to follow that if the proviso applies it will carry with it the consequence that in such proceedings the house is not to be deemed a dwelling-house to which the principal Acts apply.

The proviso is obviously intended to give relief in the case of failure to register within the specific time limit of three months. After the three months (even if the period be only extended by a day) registration may not take place except under a certificate from the county court that there was reasonable excuse for failure to register in the proper time. The granting or refusal of the certificate is left in the discretion of the county court judge, who no doubt will not certify if the

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existing rights of tenants are prejudiced by the delay, and will do so only if he is satisfied that the excuse put forward is reasonable. But if the county court judge is so satisfied it would prima facie be expected that the landlord would not be unduly penalized for what may be no more than an excusable and technical failure. On the respondent's construction a landlord may well be deprived of any future benefit from s. 2 of the Act of 1923 for the whole period during which the Acts hereinafter continue in force. No doubt the policy of the Act is as far as possible to keep houses of the specified character within the Acts, but on the other hand vested rights should not be too harshly destroyed. These considerations on either side need not be laboured, because the decision of this case must depend on the true meaning of the words of the Act read as a whole and together with the rest of the Acts.

It is necessary, therefore, to examine somewhat critically the exact words of the proviso and the exact words of s. 2 of the Act of 1923 which are to be incorporated. The defendant's contention is that the incorporation in the proviso of s. 2 of the Act of 1923, but only " as from the date on which the application for registration is made," has the effect that the dwelling-house has become, and continues to be, a house to which the principal Acts apply, all past exclusion being wiped out, but that these Acts may still at some subsequent date cease to apply if at that date the landlord again comes into possession of the dwelling-house. It is unfortunate, if this is the meaning of the proviso, that it was not more clearly expressed, as it might easily and simply have been. The question is whether that meaning can be extracted from the words used. If the words of s. 2 of the Act of 1923 were written out in extenso but with the expressed variation it would run as follows : " Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act "—that is the Act of 1923—" or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then (not from either of these dates but) as from the date on which the application for registration is made, the principal Act shall cease to apply." It is only in this way as I think that s. 2 of the 1923 Act can be held to apply. The change in the date of the application is the only specific variation required by the proviso. There is to be no change in the conditions under which the section is to operate. These no doubt are in the past but they are not abrogated, though their effect is suspended and postponed to the different date on which s. 2 of the Act of 1923 is to apply.

The respondent's case postulates a much more serious variation than one merely of a date. It postulates the meaning that whatever has been effected in the past so as to bring s. 2 into operation is to be cancelled and nothing is to be counted of significance for this purpose except what may occur in the future as on a fresh departure. In my judgment this reading cannot be extracted from the words used, though on a superficial view it might seem a simple construction. It involves a re-writing of the section in substance. My opinion is, I think, also confirmed by two considerations: (1.) the proviso is to operate "notwithstanding anything in the last foregoing subsection"—that is sub-s. 1 of s. 2 of the Act of 1933, which says that s. 2 of the Act of 1923 is not to apply to the class of houses described. That is clearly meant to include where necessary a reference to past events. Conversely it seems that when the proviso to sub-s. 2 says that that section of the Act of 1923 is to apply it must cover where relevant any previous occasion on which the landlord came into possession; (2.) the proviso is an exception to the primary enactment that "in any proceedings of the kind described the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply." Prima facie the proviso is stating conditions under which—it is "subject as hereinafter provided"—the dwelling-house is not so to be deemed. In other words, the proviso is dealing with a then present status to be determined by taking into account as from the date of the application the actual events which, if and when taken into account, exclude the dwelling-house from the operation of the Acts. These two considerations seem to me to support the conclusion which I have stated.

I have so far disregarded sub-s. 2 of s. 2 of the Act of 1923, which seems to me to be even more adverse to the respondent's contention. Some reliance was placed on sub-s. 5 of s. 2 of the Act of 1933. I do not think on any view a later subsection could have the effect of making sub-s. 2 mean something other than what I think to be its true meaning. But all that sub-s. 5 appears to be saying is that whereas if a registration has been effected in the specified time it may be cancelled on any proper ground, a registration effected under a certificate of excuse can only be cancelled on the simple ground that the principal Acts had not ceased to apply before the passing of the Act of 1933. It may be that the granting of the certificate by the county court is taken to have disposed of all objections except that one vital objection.

In the result I think that where it is admitted that the principal Acts had ceased to apply before the passing of the Act of 1933, registration out of time, if a certificate of excuse is granted, only carries with it the penalty that a period is created during which the application of the principal Acts is restored. That period is the period between the passing of the Act of 1933 and the date of application for registration. If timeous application had been made, the principal Acts would not in such a case, as it seems, have been applicable at all. As it is, they become applicable for what I may call the period of default with whatever detriment may occur in consequence to the landlord during that period.

As it is admitted in this case that the principal Acts had ceased to apply before the passing of the Act of 1933, I think that the appeal succeeds on the question of construction and that it should be held that as from the date of the application the dwelling-house in question became free from the restrictions that would have attached to it if the principal Acts had applied, though they did apply temporarily, with all consequent restrictions, in the period from July 18, 1933, to the date of the application.

SLESSER L.J. By s. 2 of the Rent and Mortgage Interest (Restrictions) Act, 1923, some classes of dwelling-houses, including the present house, formerly within the operation of the Acts were excluded in certain limited cases. The material provision effecting this purpose here to be considered is in sub-s. 1. [His Lordship read it.]

By s. 2 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the enactment above quoted is amended in the case of a dwelling-house, among others, of which the rateable value on the appointed day did not exceed in the Metropolitan police district 20*l*. The house here under consideration was at Leytonstone; and the rateable value was 13*l*. a year at the material time, so that it is a dwelling-house within s. 2 of the Act of 1933. As I have already pointed out, it had been provided under the earlier Act of 1923 that where the landlord came into possession of the whole of the dwelling-house at any time after the passing of that Act, then from and after the date when the landlord came into possession the principal Act of 1920 should cease to apply to the dwelling-house.

In the present case, the landlord did so come into possession of the whole of the house on October 10, 1932, for several days, and she was, therefore, at that time entitled to the benefits of exclusion arising out of s. 2 of the 1923 Act. The house, therefore, would have become excluded by reason of those provisions from the operation of the Acts but for the Act of 1933, which by s. 2, sub-s. 1, enacts that: "Subject as hereinafter provided, section two of the Act of 1923 . . . . shall not apply to any dwelling-house" such as the plaintiff's.

But though that be so, prima facie, an exclusion of the house may yet arise in appropriate cases, for, by sub-s. 2 of s. 2 of the same Act, it is further provided that where a landlord of a dwelling-house within the section claims that by virtue of s. 2 of the Act of 1923 the principal Act has ceased to apply to the dwelling-house before the passing of the Act, he may, within three months of the passing of the Act, that is, before October 18, 1933, apply to the appropriate local authority for the registration of the dwelling-house, and thereupon the house will continue to be excluded from the Acts by virtue of s. 2 of the Act of 1923. But if the landlord fails so to make application to register before October 18, 1933, the house will be deemed, subject to the proviso which I later discuss, to be within the Acts, notwithstanding that the landlord had entered into possession. This I take to be the effect to be inferred from the obscure language of the sub-section.

A difficult question arises which may one day fall to be decided, whether the house is to be deemed to be excluded as from the original exclusion since 1923, or since the passing of the Act of 1933. Rights which may have been acquired by third parties on the assumption that the landlord was lawfully in possession between 1923 and 1933, raise problems which we have not here to resolve.

In the present case the landlord failed to apply for registration within the prescribed period and, therefore, unless she could bring herself within the proviso, she could not be heard to say that the Act of 1933 did not apply to the house of which the defendant is now in possession, so as to deprive the landlord of the protection of the 1923 Act.

By this proviso a further ground of relief is given to the landlord, if she can avail herself of its terms, notwithstanding the fact that she had failed to register within the prescribed time. She must satisfy the county court that there was reasonable excuse for the failure to make application for registration and obtain from that court a certificate to that effect. Thereafter, if she applies to register within seven days after the certificate has been granted, it is provided that s. 2 of the Act of 1923 shall, notwithstanding anything in sub-s. 1 of s. 2 of the Act of 1933, apply to the dwelling-house as from the date on which application for registration was made. In this case the landlord succeeded in obtaining her certificate under this sub-section, and duly registered the house within seven days thereof. She now maintains that from the date when she made application for registration, namely the first week in January, 1934, she is entitled, in the words of the sub-section, to say that s. 2 of the Act of

1923 shall apply to the dwelling-house, that is to say, that, as she had entered into possession in 1932, and under the Act of 1923 the house would have been excluded from the Acts, the provisions of s. 2 of the Act of 1933 not applying, she is entitled as from the date of the application to register to claim that the dwelling-house is excluded from the Acts.

In my view this contention is correct. It is scarcely disputed that had the landlord duly registered before October 18, 1933, she would have been able to have claimed that s. 2 of the Act of 1923 would have applied; that, having been in possession, and having satisfied the requirements of s. 2 of the Act of 1923, her dwelling-house would have been outside the Act. To my mind the proviso does no more, when its conditions are satisfied, than to postpone the date when the landlord may claim that her dwelling-house is excluded from the Act to the date of the application for registration which follows upon the certificate. To give any further effect to this proviso and to hold, as the learned judge appears to have done, that the proviso does no more than give the landlord a right after the registration to enter into possession and for the first time to take advantage of s. 2 of the Act of 1923, is to hold that the proviso, when satisfied, has produced an entirely new legal situation, with consequences different from the case where registration is within the three months of the passing of the Act, and that the proviso is not merely dealing with the correction of an omission, with consequences as to the time to which rights may be postponed, but is assuming that, after the lapse of the first period for registration, the subsequent registration will produce a more restricted legal right in the landlord by excluding her right to rely upon the fact that she has already once entered into possession, and to require a further new entry. Of course, if the language of the proviso compels it, the Court will not hesitate to come to such a conclusion; but if the language is not so compulsive, so to construe a proviso is contrary to normal canons of construction. I would apply to the argument of Mr. Leon, on behalf of the tenant, the observations of Fletcher Moulton L.J., as he then was, in

Rex v. *Dibdin* (1), where he said: "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington* (2); *In re Brockelbank* (3); and *Hill* v. *East and West India Dock Co.* (4), have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso."

In my view, the proviso here is dependent upon the enacting words of sub-s. 2, which substitutes, where a certificate has been obtained, the registration consequent upon that certificate for the original registration, making only thereafter this distinction, that the date from which the landlord may be heard to claim that her entry into possession under the 1923 Act has taken the house outside the Act is, if the claim be successful, an exclusion of the house from the Act as from her date of application to register under the proviso rather than from the earlier date from which she might have excluded the house had she registered within the prescribed three months.

It follows, therefore, in the present case, for the reasons above stated, and for the further reason stated by my Lord, with which I agree, that this appeal must be allowed. It follows, also, that for the purpose of the computation of rent after January, 1934, the tenancy can no longer be regarded as a statutory tenancy.

TALBOT J. I have come to the same conclusion. I think, with the other members of the Court, that it is impossible to find any construction of the relevant sections of the Act of 1933 which does not present serious difficulties. It is no exaggeration to say that the more the Act is studied, the more does its obscurity appear. Any construction which can be suggested is exposed to the forcible argument: "If that had been the intention of Parliament, it would have been expressed in plain language, as it might easily have been." But the Act must be supposed to mean something; and the construction adopted by my colleagues appears to me to be subject to fewer objections than any other. It may be summarized as follows: For the future the cheaper and smaller houses, as defined by the Act, are not to be deprived of the protection of the Acts by the procedure allowed by the Act of 1923; but a landlord who had already lawfully decontrolled a house under the Act of 1923 can, by registering his possession with the local authority specified, within three months from the passing of the new Act of 1933, retain the advantage of the decontrol. If a landlord has let the three months expire without registering, but can get a certificate from a county court that he had a reasonable excuse for this, the certificate is to give him, if he then registers, the same advantage, but subject to the delay which his failure to register within the three months has involved. This seems to me to be at least an intelligible scheme of legislation, and I believe it must be what Parliament intended; and although those responsible for drafting the Act have made it very difficult to find it, I think we can rightly hold that it is there.

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(1) [1910] P. 57, 125.
(2) (1844) 6 Q. B. 649.
(3) (1889) 23 Q. B. D. 461.
(4) (1884) 9 App. Cas. 448.

Appeal allowed.

Solicitors for appellant: *Simon, Haynes, Barlas & Ireland.*
Solicitors for respondent: *Hamilton Hill & Evershed.*

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ALLEN *v.* WATERS AND COMPANY.

Damages—Injury by accident—Landlord and Tenant—Landlord's breach of statutory obligation to keep in repair—Injury to wife of tenant—Tenant's claim for special damages—County Council Hospital—Expenses—Not recovered within six months of patient's discharge—Whether expenses to be taken into account as part of special damages—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 131, 132—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *ss.* 14, 16.

A weekly tenant brought an action against his landlord for special damages in respect of injury to his wife caused by the breach of the landlord's duty to keep the premises in repair, and the county court judge awarded a sum for damages which included an amount claimed by the London County Council for the wife's expenses at a hospital provided by them. On appeal:—

Held, (1.) (by the whole Court of Appeal) that whether or not the hospital expenses were recoverable by the Council from the tenant, more than six months having elapsed since the discharge of the patient from hospital, the county court judge was entitled in assessing the special damages to take these expenses into account and to award their amount for payment over to the Council. (2.) (by Lord Hanworth M.R. and Romer L.J., Goddard J. dissenting) that the hospital expenses were still recoverable by the Council and therefore that on this ground also their amount had been properly included in the special damages. The provision in s. 14 of the Local Government Act, 1929, giving the Council the like power to provide hospitals as was conferred on local authorities by s. 131 of the Public Health Act, 1875, did not operate to incorporate s. 132 of the Act of 1875, which gives power to recover hospital expenses at any time within six months of the patient's discharge from hospital, and the duty imposed by s. 16, sub-s. 1, of the Act of 1929 on the Council to recover these expenses impliedly carried with it the power to recover these expenses in any Court of competent jurisdiction, a power additional to the power to recover these expenses summarily conferred by s. 16, sub-s. 2, and not subject to the six months' limitation applicable to summary proceedings.

APPEAL from the judge of the Brompton County Court.

The plaintiffs, Thomas J. Allen and his wife Ellen Constance Allen, lived at a basement flat at 10 Limerston Street, Chelsea, of which the defendants were the landlords. On October 19, 1933, Mrs. Allen met with an accident while descending the area steps owing to their defective and unsafe condition and sustained injuries to her ankles and feet. She was removed to St. Luke's Hospital, which was a hospital under the control of and provided by the London County Council, and was in the hospital till November 21, 1933. The hospital rendered an account to Mr. Allen on January 11, 1934, for 16*l.* 2*s.* 11*d.*

On May 16, 1934, the plaintiffs commenced proceedings against the landlords for damages, claiming that they were joint weekly tenants of the flat and that the defendants in breach of their implied statutory undertaking to keep the premises in repair allowed the stone steps leading to the area to become and remain defective and unsafe and dangerous, although notice of such defect was given to them by the plaintiffs. Mrs. Allen claimed 50*l.* damages for personal injury and Mr. Allen claimed 27*l.* 17*s.* 1*d.* as special damages incurred by him. Included in the special damage was the amount of the hospital account, which had not been paid.

At the trial it was proved that Mr. Allen alone was the tenant of the flat and Mrs. Allen's claim for damages was then abandoned. The county court judge awarded as special damages to Mr. Allen the sum of 24*l.* 16*s.* 7*d.*

The defendants appealed.

The appeal related only to the sum of 16*l.* 2*s.* 11*d.* included in the special damages in respect of the hospital expenses. It was claimed that these expenses were not recoverable by the hospital, as more than six months had elapsed since Mrs. Allen was discharged from hospital, and therefore that no special damages ought to have been awarded in respect of them.

Donald McIntyre for the appellants. No sum ought to have been included in the special damages in respect of the sum of 16*l.* 2*s.* 11*d.* charged for hospital expenses. These expenses have not been paid, and the plaintiff Thomas Allen is now under no liability to pay them because more than six months have elapsed since the discharge of the patient. Even if the plaintiff paid them voluntarily it would not cast on the appellants any liability for damages in respect of them. It is claimed that the Council's right to recover hospital expenses is subject to the six months' limitation. That limit was

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imposed on local authorities by s. 132 of the Public Health Act, 1875 (1), and by s. 75 of the Public Health (London) Act, 1891; and the only question is whether the position of the County Council is different under the Local Government Act, 1929. That Act by s. 14 (1) gives the London County Council "the like powers with respect to the provision of places for the reception of the sick as are conferred on local authorities by section one hundred and thirty-one of the Public Health Act, 1875." Under the Act of 1875 a group of sections, namely, ss. 131, 132 and 133, deal with the provision of hospitals, and while s. 131 confers on local authorities power to provide them for the use of the inhabitants of a district, s. 132 provides that "any expenses incurred by a local authority in maintaining in a hospital . . . . a patient who is not a pauper, shall be deemed to be a debt due from such patient to the local authority, and may be recovered from him at any time within six months after his discharge from such hospital. . . . ." That provision must be treated as read into the Local Government Act, 1929, under s. 14 of that Act as one of the " like powers with respect to the provision of places for the sick." It is true that s. 14 only refers in terms to s. 131, but the intention must be to include the group of sections in the Act of 1875 dealing with hospitals.

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(1) Public Health Act, 1875, s. 131: "Any local authority may provide for the use of the inhabitants of their district hospitals or temporary places for the reception of the sick. . . . ."

Sect. 132: "Any expenses incurred by a local authority in maintaining in a hospital . . . . a patient who is not a pauper, shall be deemed to be a debt due from such patient to the local authority, and may be recovered from him at any time within six months after his discharge from such hospital. . . . ."

Local Government Act, 1929, s. 14: "(1.) The Local Government Act, 1888, shall, as from the appointed day, have effect as if amongst the powers conferred by that Act on county councils (including the London County Council) there were included the like powers with respect to the provision of places for the reception of the sick as are conferred on local authorities by section one hundred and thirty-one of the Public Health Act, 1875, as amended by section sixty-four of the Public Health Act, 1925."

Sect. 16: "(1.) As from the appointed day, it shall be the duty of the council of every county . . . . to recover from any person who has been maintained by them in any institution . . . . or from any person legally liable to maintain that person, the whole of the expenses incurred by the council . . . . in the maintenance of that person, or, if the council . . . . are satisfied that the persons from whom the expenses are recoverable cannot reasonably, having regard to their financial circumstances, be required to pay the whole of those expenses, such part, if any, of the expenses as they are in the opinion of the council . . . . able to pay. . . . ."

"(2.) Any expenses recoverable under this section shall, without prejudice to any other remedy, be recoverable summarily as a civil debt."

If this were not the correct view, there would, it is contended, be no power to enforce the payment of hospital expenses under the Act of 1929 except in the police court. Sect. 16, sub-s. 1, of this Act (1) makes it the duty of the Council to recover these expenses but confers no power to do so, and under sub-s. 2 the expenses are only made recoverable in the police court, when the six months' limitation would apply. The fair inference from the form of s. 16, sub-s. 1, is that the power to recover is treated as already in existence under the earlier Acts. It is true that s. 16, sub-s. 2, contains the words " without prejudice to any other remedy." These are not words creating a new remedy but preserving existing remedies, namely, those under s. 132 of the Act of 1875 and s. 75 of the Act of 1891.

[GODDARD J. The Act of 1891 conferred powers on sanitary authorities. Have their functions been transferred to the County Council ?]

Not in terms, although those of the Metropolitan Asylums Board under the 1891 Act are transferred by s. 18 (*e*) of the Act of 1929. It is suggested that inferentially the functions of the sanitary authorities were also transferred. An alternative view is that the remedies preserved by s. 16, sub-s. 2, are not remedies in Court at all but other remedies such as those provided for by the Poor Law Act, 1927. The Court should be slow to construe the Act of 1929 as doing away for the first time with the six months' limitation which Vaughan Williams L.J. in *Metropolitan Water Board* v. *Bunn* (2) said was intended to ensure that " people of small means should not be harassed by claims of local bodies for a long period such as six years."

(1) See note (1) ante, p. 202.

(2) [1913] 3 K. B. 181.

In *Tottenham Local Board of Health* v. *Rowell* (1) it was held that when at the option of the local board proceedings might be taken in the county court the six months' limitation contained in s. 11 of the Summary Jurisdiction Act, 1848, applied to proceedings in the county court as well as to proceedings before justices. It is true that the decision in *Bunn's* case (2) was to the contrary effect.

H. Salter Nichols and *H. Moses* for the respondents. The Public Health (London) Act, 1891, s. 75, can have no application to this case, as it conferred power on sanitary authorities, and the successors of the sanitary authorities were the borough councils and not the London County Council under the London Government Act, 1899, s. 4. Similarly, the Public Health Act, 1875, can have no application except to the extent that it can be said to be imported into the Act of 1929 by virtue of s. 14. But the reference there to s. 131 of the Act of 1875 in s. 14 is a strong indication that s. 132 is not intended to be imported, and it is left to s. 16 of the Act of 1929 to deal with the recovery of hospital expenses. It is true that s. 16, sub-s. 1, in terms only imposes on county councils the duty of enforcing payment of hospital expenses, but it must give them the power to recover the expenses in any Court of competent jurisdiction as reasonably incidental to the duty thereby imposed. This is really enough to conclude the case. It is said that sub-s. 2 shows that this implication is not to be drawn, but s. 16, sub-s. 2, deals with expenses "recoverable" and only confers an additional power—namely, to proceed summarily in the police court. No doubt any such proceedings would be subject to the six months' limitation by virtue of s. 11 of the Summary Jurisdiction Act, 1848; but this power is expressly conferred "without prejudice to any other remedy." There is no limit on the remedies preserved. No doubt they include the remedies given by the Poor Law Act, 1927, but they also include remedies by action in any Court of competent jurisdiction; and proceedings in any such Court would not be subject to the six months' limitation: *Bunn's* case (1) and *Blackburn Corporation* v. *Sanderson.* (2)

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(1) (1876) 1 Ex. D. 514.

(2) [1913] 3 K. B. 181.

But even if the six months' limitation was held to apply, that would not prevent the county court judge, in assessing the special damages which reasonably flowed from the injury to the wife, from taking into account the expenses incurred by the wife while in hospital.

McIntyre replied.

LORD HANWORTH M.R. We have had a very interesting argument in a field of law which is by no means easy, but we have come to the conclusion that the appeal must be dismissed.

The appeal arises in this way. Messrs. Waters & Co. are the owners of certain premises, and on the stairs of those premises Mrs. Allen had an accident and suffered an injury. She brought an action to recover damages from the owners of the premises. A claim was also made by Mr. Allen in respect of expenses which he said he had incurred and which he claimed to be entitled to recover as damages suffered in consequence of the liability imposed on him in relation to his wife's accident. The learned judge awarded him 24*l.* 16*s.* 7*d.*, and the defendants' appeal is brought in respect of 16*l.* 2*s.* 11*d.* That sum is an amount in respect of which the London County Council served on Mr. Allen on January 11, 1934, a claim expressed in these terms: "Maintenance of Mrs. Ellen Allen when in St. Luke's Hospital from October 19, 1933, four and five-sevenths weeks at 3*l.* 8*s.* 6*d.* per week, 16*l.* 2*s.* 11*d.*" St. Luke's Hospital is a hospital under the control of, and, as I think, provided by, the London County Council. The defendants contend that there is no cause of action in respect of that amount. It is said, first, that no proof was given by Mr. Allen that he had paid it. Mr. Allen and his wife, it should be stated, are in humble circumstances and 16*l.*, if required to be paid all at once, would probably impose some difficulty on Mr. Allen. As he has not paid the money it is contended that he ought not to be allowed to recover from the defendants a sum which, if he did recover it, ought to be paid over to the hospital. It is also said that he cannot recover it because it is not a liability to be imputed to them.

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(1) [1913] 3 K. B. 181.

(2) [1902] 1 K. B. 794.

It is to be remembered on this point that the judge is entitled to give damages which have been suffered by a husband and wife arising out of the wife's accident. It not infrequently occurs that a husband has become liable to a doctor for fees which have not been paid at the time when action is brought, and it sometimes happens that they could not have been paid; nevertheless, there was the liability to pay and, whether the fees have been paid or not, a claim in respect of them is in practice allowed as good and added to the sum which is recoverable as damages.

We think that the same principle applies in this case, and that it was competent to the learned judge to award the sum in question to Mr. Allen, he receiving it for the purpose of paying it over to the London County Council in discharge of the hospital account. In our view, he can recover it solely with the liability imposed on him of handing over the money to the hospital. It is in that sense, as we understand it, that the learned judge awarded the sum, and it is in that sense that we support the judgment of the county court judge.

An interesting argument was presented by Mr. McIntyre. He contended that, although the account had been rendered to Mr. Allen, there was no power to recover from him as the claim was a mere claim for a sum which the county council could in no circumstances recover in any Court, and that the case was not similar to one where fees were due to a doctor.

That leads me to consider the sections to which reference has been made. By s. 14, sub-s. 1, of the Local Government Act, 1929: "The Local Government Act, 1888, shall, as from the appointed day, have effect as if amongst the powers conferred by that Act on county councils (including the London County Council) there were included the like powers with respect to the provision of places for the reception of the sick as are conferred on local authorities by section one hundred and thirty-one of the Public Health Act, 1875, as amended by section sixty-four of the Public Health Act, 1925." Sect. 14, sub-s. 2, provides that s. 131 is to have effect as if the power to provide places for the reception of the sick included power to provide places for the reception of pregnant women.

Mr. McIntyre argues that s. 14, by using the words "the like powers with respect to the provision of places for the reception of the sick," introduces not merely s. 131 of the Act of 1875 but the fasciculus of sections relating to the power of a local authority to provide hospitals, and that, while s. 131 gives power and authority to provide the hospitals, s. 132 gives a right to recover the cost of maintenance of a sick person in the hospital, and s. 133 the power to provide a temporary supply of medicine. He says that those are the powers with respect to the provision of places for the reception of the sick and that, when s. 132 is introduced in that way, it carries with it a limitation on the power of recovery in that the cost of maintenance may only be recovered at any time within six months after the patient's discharge from the hospital or place of reception. This limitation, Mr. McIntyre says, has been brought forward along with s. 131 and must be complied with in respect of any liability which it is sought to attach to Mr. Allen in respect of the sum of 16*l.* 2*s.* 11*d.*, that the discharge of Mrs. Allen took place in November, and it is pointed out that these proceedings were not begun until after the time limit of six months had been exceeded.

It is necessary, therefore, closely to examine s. 14 to see whether it has carried forward something more than s. 131 of the earlier Act. I have come to the conclusion that s. 131 is named specifically because that section and no more is carried forward. The Act of 1929 itself provides, by s. 16, for the recovery of expenses, and therefore, under the rule expressio unius, etc., it does not seem necessary to infer that s. 132 of the Act of 1875 has been imported by the words "with respect to the provision of places for the reception of the sick" into the Act of 1929 so as to introduce the time limit of six months and to impose that limit on the power of recovering expenses contained in s. 16.

I turn, therefore, to consider s. 16, because another point arises on that section. In so far as there is power to recover expenses by summary jurisdiction, there is a limitation of six months. It is said that, even if s. 16 be taken by itself, there are indications in its terms of an intention to preserve that limit of six months. Sect. 16, sub-s. 1, reads: "As from the appointed day, it shall be the duty of the council of every county . . . . to recover from any person who has been maintained by them in any institution . . . ., or from any person legally liable to maintain that person, the whole of the expenses incurred by the council . . . . in the maintenance of that person. . . . ." The argument for the appellants is that, although sub-s. 1 imposes the duty to recover, the liability in respect of the expenses which it is the duty of the council to recover is not created in this section at all, and that the liability must therefore be created by s. 132 of the Act of 1875. I feel compelled to reject that argument. It appears to me that s. 16, sub-s. 1, by imposing the duty to recover expenses from a person who has been maintained, connotes the liability of the person from whom recovery is to be made. Mr. McIntyre says: "If you look at other sections creating a liability it will be found that it is stated to be a debt, and that there is no such word as 'debt' in this section." Sub-s. 1 of s. 16 imposes the duty to recover—not necessarily from the person to whom the services in the hospital have been rendered, but, it may be, from any person legally liable to maintain that person—the whole of the expenses incurred "or, if the council . . . . are satisfied that the persons from whom the expenses are recoverable cannot reasonably, having regard to their financial circumstances, be required to pay the whole of those expenses, such part, if any, of the expenses as they are in the opinion of the council . . . . able to pay." The sub-section does not therefore impose a direct liability for the whole debt, but it says that there shall be the duty, and, as I think, also the right, to recover to the extent to which the council thinks there is a capacity to pay, whether on the part of the patient or of the person who was bound to maintain him. In other words, the sub-section is not recognizing a common law liability but a statutory liability, such as is imposed in a number of cases.

An illustration of that is supplied by *Barraclough* v. *Brown* (1), where a statute gave power to raise a wreck and to clear a fairway and to recover the cost of so doing from the owner of the vessel which encumbered the passage. Lord Herschell says (2): "The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted." So, in the present case, there is a statutory liability imposed on a person who may not have made the request that the services should be rendered, or may not have received the services himself, but who is rendered liable because he had a duty to maintain the patient, although he may have violently protested against the patient's being taken to the hospital and have been an unwilling spectator of those services being rendered. That, I think, is the effect of s. 16, sub-s. 1, which, in imposing a duty to recover, connotes also a liability on the appropriate person to pay.

Sub-s. 2 of s. 16 provides: "Any expenses recoverable under this section shall, without prejudice to any other remedy, be recoverable summarily as a civil debt." This refers to proceedings before justices. Sub-s. 2 says that it shall be possible for the expenses to be recovered in this way as a civil debt in addition to other forms of remedy. If a proceeding has to be taken before the justices it may well be that, as determined by Vaughan Williams L.J. in *Blackburn Corporation* v. *Sanderson* (3), if in that Court there is a limit of six months, the lex fori will apply and so limit the possibility of recovering any amount in that Court, because that limitation goes to the remedy and not to the right. It is quite clear, however, that sub-s. 2 contemplates there being other remedies. Then it is said: "If you look at such cases as *Tottenham Local Board of Health* v. *Rowell* (4) you will find that the recoverability of the debt is subject to the same condition in whatever

(1) [1897] A. C. 615.

(2) Ibid. 619.

(3) [1902] 1 K. B. 794.

(4) 1 Ex. D. 514.

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Court the remedy is pursued, and, inasmuch as the remedy before the justices would be subject to a time limit, so, even if proceedings are brought in the county court, the time limit must be observed." I cannot think that *Tottenham Local Board of Health* v. *Rowell* (1) can be treated as of general application. What had happened there was that there was a power under the Public Health Act, 1848, s. 69, to recover the cost of sewering and paving a street. The sum was to be paid by the owners in default, and that sum might be recovered in a summary manner before the justices, which would mean that there was a six months' time limit attached to it. Then by the Local Government Act (1858) Amendment Act, 1861, an additional power was given to recover the sums in the county court. What sums? The sums which had been originally sums to which the six months' time limit attached, and no others. The Court held that the Act of 1861 merely gave a similar remedy in the county court to the remedy which had been given before by the Act of 1848 and had not discharged the authorities from conforming to the six months' condition which had been imposed by the earlier statute. That that is the effect of the Act and that that is the ground of the decision is, I think, made abundantly plain from the judgment of Hamilton L.J., as he then was, in *Metropolitan Water Board* v. *Bunn.* (2)

Were it not for *Tottenham Local Board of Health* v. *Rowell* (1), the point that this limitation is carried forward would hardly be arguable; but that that case is distinguishable it can scarcely be doubted. *Blackburn Corporation* v. *Sanderson* (3) and *Metropolitan Water Board* v. *Bunn* (2) are both cases in which the additional remedy was recognized, the additional remedy being one to which the limit did not apply.

I come, therefore, to look, as after all one must look, at the actual words of s. 16, sub-s. 2. They are simple: "Any expenses recoverable under this section shall, without prejudice to any other remedy, be recoverable"—not "recovered,"

(1) 1 Ex. D. 514.
(2) [1913] 3 K. B. 181, 195.
(3) [1902] 1 K. B. 794.

but "recoverable"—"summarily as a civil debt." They may be recovered by suit in accordance with s. 16, sub-s. 1, but they may, in addition, because that power is without prejudice to other remedies, be recovered summarily as a civil debt. There is no direction to proceed in one Court only, and the expenses may be recovered in whatever Court is chosen, and, having regard to the decisions to which I have referred, it appears to me that, if it is sought to recover them in the county court, that can be done free of the restrictions which belong to a recovery before justices, which, after all, is a summary proceeding, and in respect of which there is not the same facility for examination and discussion as is provided in the county court.

For these reasons it appears to me that s. 14 did not carry forward s. 132 of the Public Health Act, 1875, and that s. 16, sub-s. 2, provides a remedy that is in addition to other remedies, and those other remedies stand freed from the condition of a time limit of six months which belongs to and may be operative in respect of the remedy in another Court.

I have come therefore to the conclusion, on the second point, that there was an enforceable liability as against Mr. Allen, and that on both grounds the learned judge was entitled to award the 16*l.* 2*s.* 11*d.* in favour of the plaintiff.

The result is that the appeal must be dismissed.

ROMER L.J. I agree with the conclusion at which the Master of the Rolls has come and with the reasons which he has given. In the circumstances I do not think that I can usefully add anything.

GODDARD J. I agree in the result that this appeal should be dismissed, but I have the misfortune to differ on one point which has been argued here and, as I have formed a clear opinion about it, I feel that I must state my view.

Mr. McIntyre's argument is that as the right of the poor law authority, the London County Council, to recover the cost of this hospital treatment is barred, the cost of the treatment cannot be included as part of the special damage.

The question does not arise if the right is not barred, and I therefore propose to consider first whether or not the right is barred. I have come to the conclusion that, in the particular circumstances of this case, more than six months having elapsed since the patient was discharged from the hospital, the London County Council would have no right to recover these expenses.

The first provision in the Acts for hospital treatment and accommodation is to be found in the Public Health Act, 1875. By that Act duties are placed on authorities, who, be it noted, were not in those days the poor law authorities, to provide hospitals, and provision was made for their recovering from the patients the cost of their maintenance in hospital. That maintenance could be recovered either in a court of summary jurisdiction or, at the option of the local authority, in a county court. But referring back to s. 132 of the Public Health Act one finds that in express terms a time limit is placed within which the local authority can recover the maintenance. Therefore, whether the proceedings were taken in the county court or whether they were taken in the court of summary jurisdiction, the six months' limitation applied. Of course, under the Summary Jurisdiction Acts a civil debt cannot be recovered in the police court after six months. Such debts as can be recovered in a police court or courts of summary jurisdiction must be sued for within six months; but the limitation on the right of recovery was not due to that provision, but to s. 132, which imposed a time limit generally.

Exactly the same state of affairs is to be found in the Public Health (London) Act, 1891, which applies to the metropolis only. There, again, the hospital authorities were not the poor law authority; they were the sanitary authority. Various sanitary authorities are referred to in the Act. They had a similar right to recover the cost of maintenance. They had a similar right to recover it in the courts of summary jurisdiction or in the county court, but they had not the right to recover it after six months. Then came the Local Government Act, 1929, which made the county council what

I may call the hospital authority. I entirely agree with my Lords that s. 132 of the Public Health Act, 1875, is not incorporated, by reference or otherwise, into the Act of 1929. Nor can I assent to Mr. McIntyre's argument that, because only a right to recover the expenses is given to the London County Council by s. 16, that does not create a debt, or an obligation to pay, on the part of the patient. I think it clearly does.

I then come to the question what is the meaning of s. 16, sub-s. 2, which provides: " Any expenses recoverable under this section shall, without prejudice to any other remedy, be recoverable summarily as a civil debt " ? For the reasons which I will state I think that those words mean that, so far as legal proceedings are concerned, a court of summary jurisdiction is the only court in which those expenses can be recovered and that, therefore, the six months' limitation which is imposed on all summary proceedings applies.

The reason why I take this view is because when the Act of 1929 was passed the London County Council, who, under that Act, are the hospital authority, had also become the poor law authority, and their duty of providing hospitals is part of their duty as the poor law authority. It will be found that s. 16 is in Part I. of the Local Government Act, 1929, and Part I. of that Act deals with poor law. One has to remember that from a very early stage in the history of the poor law all matters relating to the recovery of relief, or the cost of relief, given to poor persons have been dealt with by justices in courts of summary jurisdiction and in no other Courts. If my memory serves me right, there is no other Court which deals with the recovery of relief, and making relatives liable to pay the cost of the relief of their relations who have been relieved by the guardians of the poor. These are matters which have always been dealt with by the justices.

When I find that there has been such a course of legislation consistently imposing a time limit I am not inclined to construe the provision in sub-s. 2 of s. 16 as a departure from that consistent course of legislation unless the words clearly compel me to do so. I think that the words " shall be recoverable "

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in this case indicate, first, that henceforth, as the hospital authority has now become the poor law authority, the cost of relieving the person in the hospital is to be recovered in the same court, and must be recovered in the same court, as deals with all other questions relating to the cost of relief of the poor. That, I think, is the amendment which has been made by the section, and by it the jurisdiction to deal with these cases is taken away from the county court and is confined to the court of summary jurisdiction, and, consequently, the time limit of six months' limit which has consistently appeared in all legislation on this subject, except in the Infectious Disease (Notification) Act, 1889, is still maintained.

There seems to me to be all the more reason why it should be so because, as Mr. McIntyre pointed out, Vaughan Williams L.J. in *Metropolitan Water Board* v. *Bunn* (1) said that the reason why the six months' limitation was put in was for the protection of poor people. I therefore think that I ought not to be ready to construe this clause in a way which would take away that protection from the poorer people, more especially when this particular matter is now made a part of the scheme of poor relief.

For these reasons I have come to the conclusion that Mr. McIntyre's argument is right so far as it goes to say that the remedy must be obtained in a court of summary jurisdiction, and that, as in a court of summary jurisdiction you cannot bring a claim after six months, the remedy is barred after the six months are past.

In my judgment, that does not dispose of the question because, although it may be true that the London County Council cannot recover from Mr. Allen the cost of his wife's maintenance, it was an eminently right and reasonable thing that she should have been taken to hospital, and if in sending her to hospital or in keeping her there a debt has been incurred, I see no reason why that should not be treated as part of the special damage which the husband has suffered, although in particular circumstances the remedy against the husband

(1) [1913] 3 K. B. 181.

may be barred. It is provided, indeed, in s. 16, that the local authority need not enforce their remedy against the patient, or the person liable to maintain the patient, having regard to his financial circumstances. Whether or not the hospital charges can properly be included in the damages awarded to the husband does not seem to me to be a question to be determined by the decision of the county council at any particular time not to call on him to pay because he is unable to or, at least, unable to unless he can recover the money from somebody else. I do not think that the right view depends on whether the remedy against the husband is barred, or the people who have the right to recover the hospital charges have or have not yet determined to sue for them, but whether in sending the woman to hospital a reasonable and proper thing was done. If it was, and if an expense has been incurred by doing so, I think it is right that the wrongdoer should bear that cost. Any sum which is now recovered by the husband will be held by him for the hospital and will have to be paid by him to the hospital.

I omitted to say that I construe the words in s. 16, sub-s. 2, " without prejudice to any other remedy," as referring to the remedies given to poor law authorities by s. 44 of the Poor Law Act, 1927, such as taking money that may be found on a person admitted to the hospital.

For these reasons I think that the money is properly recoverable and that the county court judge was right, in the result, in making the order which he did.

Appeal dismissed.

Solicitors: *Griffinhoofe & Brewster; Fortescue, Adshead & Guest.*

H. C. G.

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LANCASHIRE COUNTY COUNCIL *v.* SOUTHPORT BOROUGH COUNCIL.

Poor Law—Irremovability—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 132, *and Ninth Schedule, Part I.—Poor Law Act,* 1930 (20 *Geo.* 5, *c.* 17), *ss.* 93, 104.

By the Poor Law Act, 1930, s. 93, sub-s. 1: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order."

By s. 104: "No person shall derive or acquire, or be deemed to have derived or acquired, a settlement or status of irremovability except in accordance with the provisions of this Part of this Act; and any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates."

A poor person who was born at Chorley in the county of Lancaster on August 25, 1878, was a domestic servant from 1894 to 1896, residing in the parish of Leyland in the said county. From 1896 to May 25, 1900, she resided in the parish of Ormskirk in the said county. From May 25, 1900, to August 27, 1900, she was an inmate of Ormskirk Union poor law institution. From August 27, 1900, to October 3, 1907, and from November 7, 1907, to January 25, 1911, she resided at various addresses in the parish of Ormskirk without receiving relief. From January 25, 1911, to March 12, 1913, she was again an inmate of Ormskirk poor law institution. From March 12, 1913, to March 16, 1913, she resided in the county borough of Southport without receiving relief. On March 16, 1913, she was admitted into the casual wards at the county borough of Southport, and on March 17, 1913, she was transferred to Ormskirk Union poor law institution, where she remained until March 14, 1931.

Before April 1, 1930, the "appointed day" under the Local Government Act, 1929, the parish of Ormskirk and the area comprised in the county borough of Southport were within the Ormskirk poor law union. After the "appointed day" the area comprising the county borough of Southport became a separate poor law area, and that comprising the parish of Ormskirk became part of the poor law area of the county of Lancaster.

From March 14, 1931, to November 17, 1931, and again from November 17, 1931, to March 3, 1933, the poor person resided in the county borough of Southport and was in receipt of outdoor relief. On October 12, 1932, the Minister of Health made an order under the Poor Law Act, 1930, s. 161, that the poor person was chargeable to the county borough of Southport. On March 3, 1933, Southport justices made an order that she should be removed to the county of Lancaster, but Lancashire Quarter Sessions reversed this order, holding that the poor person was resident in the county borough of Southport immediately before the appointed day, and that she had acquired there a status of irremovability by virtue of the Local Government Act, 1929, Sch. IX., Part I., para. 3, sub-paras. 2 and 3.

On appeal by the county borough of Southport the Divisional Court reversed the order of quarter sessions, holding that the poor person had not acquired a status of irremovability in Southport.

On appeal by the Lancashire County Council:—

Held, that the Poor Law Act, 1930, is a complete code dealing with settlement and removability, and that it alone applied, unaffected by the provisions of Part I. of Sch. IX. of the Local Government Act, 1929.

Held, therefore, that the removal order was rightly made.

Decision of Divisional Court [1934] 2 K. B. 339 affirmed.

APPEAL from a decision of the Divisional Court on a case stated by Lancashire Quarter Sessions.

At the above quarter sessions held in April and July, 1933, an appeal was heard against an order made by Southport justices that Margaret Traynor, a person then receiving poor relief from the general rate fund of the county borough of Southport, should be removed to the county of Lancaster, and that the council of that county should receive and provide for her according to law. The court of quarter sessions allowed the appeal and quashed the justices' order, but stated a case for the opinion of the High Court.

The facts were as follows: Margaret Traynor (therein described as "the poor person") was born at Chorley in the county of Lancaster on August 25, 1878. She resided at various addresses in Leyland and Chorley, both in the county of Lancaster, until she attained the age of sixteen years in 1894.

From 1894 to 1896 the poor person was a domestic servant residing in the parish of Leyland in the county of Lancaster aforesaid. From 1896 to May 25, 1900, she resided in the parish of Ormskirk in the county of Lancaster. From May 25, 1900, to August 27, 1900, she was an inmate at the Ormskirk Union poor law institution. From August 27, 1900, to October 3, 1907, she resided at various addresses in the parish of Ormskirk. From October 3, 1907, to November 6, 1907, LANCASHIRE COUNTY COUNCIL v. SOUTHPORT BOROUGH COUNCIL.

she was again an inmate at the Ormskirk Union poor law institution. From November 7, 1907, to January 25, 1911, she resided at various addresses in the parish of Ormskirk, without receiving relief. From January 25, 1911, to March 12, 1913, she was again an inmate at the Ormskirk Union poor law institution. From March 12, 1913, to March 16, 1913, she resided in the county borough of Southport without receiving relief. On March 16, 1913, she was admitted into the casual wards at the county borough of Southport. On March 17, 1913, she was transferred to the Ormskirk Union poor law institution, where she remained until March 14, 1931. Before April 1, 1930, the "appointed day" under the Local Government Act, 1929, the parish of Ormskirk and the area comprised in the county borough of Southport were within the Ormskirk poor law union. After the "appointed day" the area comprising the county borough of Southport became a separate poor law area and the area comprising the parish of Ormskirk became part of the poor law area of the county of Lancaster. From March 14, 1931, to November 17, 1931, the poor person resided in the county borough of Southport without receiving relief. From November 17, 1931, to March 3, 1933, the date of the removal order, she resided in the county borough of Southport and was in receipt of outdoor relief. On August 31, 1932, under the Poor Law Act, 1930, s. 161, the parties submitted a question to the Minister of Health as to the chargeability of the poor person. On October 12, 1932, the Minister of Health gave his decision that the poor person was chargeable to the county borough of Southport, but he did not decide whether or no she was irremovable from the county borough of Southport. On March 3, 1933, the removal order was made as aforesaid.

On behalf of Southport county borough it was contended that the order of the justices sitting as a court of summary jurisdiction was in law correct; that the poor person had acquired a settlement in the parish of Ormskirk and that therefore she had by virtue of sub-para. 1 of para. 3 of Sch. IX. of the Local Government Act, 1929, acquired a settlement in the county of Lancaster and was not on April 1, 1930, in the course of acquiring a settlement in the county borough of Southport; that the poor person having already acquired a settlement in the parish of Ormskirk was by reason of such settlement irremovable from the Ormskirk poor law union at any time after the year 1899 and could not subsequently have acquired or be in the course of acquiring a status of irremovability in the same poor law union even if residing in another part of the said union; that the part of the poor law union by reason of residence wherein the poor person acquired a status of irremovability was the parish of Ormskirk, where she had acquired a status of irremovability before the end of the year 1897 and had never lost such status of irremovability, and that she could not on April 1, 1930, be in the course of acquiring a status of irremovability in the poor law union of Ormskirk for the reason that she already had acquired a status of irremovability therefrom; that sub-para. 3 of the said para. 3 is only directed to the method of reckoning continuous residence in the case of persons who are qualifying for a status of irremovability and had not acquired a settlement in a parish or a state of irremovability from a union; that as the poor person was not on April 1, 1930, resident anywhere for poor law purposes as she was at that date in receipt of poor relief she was not on that date in the course of acquiring a status of irremovability.

On behalf of Lancaster County Council it was contended that the order of the justices sitting as a court of summary jurisdiction was in law erroneous; that the poor person had gained a status of irremovability in the county borough of Southport and was therefore irremovable therefrom; that under the provisions of Sch. IX. to the Local Government Act, 1929, the period of residence of the poor person without receiving relief in the parish of Ormskirk within the Ormskirk poor law union from November 7, 1907, to January 25, 1911, should be aggregated with the five days' residence without receiving relief in the county borough of Southport also within the Ormskirk poor law union from March 12, 1913, to March 16, 1913, and reckoned as continuous residence in the said county borough of Southport; that the period of residence of the poor person without receiving relief in the county borough of Southport from March 12, 1913, to March 16, 1933, was residence immediately before the appointed day under Sch. IX. to the Local Government Act, 1929, inasmuch as by the Poor Law Act, 1930, s. 93, sub-s. 1, the periods of residence of the poor person in Ormskirk Union from January 25, 1911, to March 12, 1913, and from March 16, 1913, to April 1, 1930, were not to be regarded as interrupting her residence, and were to be excluded in computing the period of residence.

Quarter sessions gave a considered judgment in which they held that the case was governed by the Local Government Act, 1929, Sch. IX., Part I., para. 3, sub-paras. 2 and 3; that the poor person's residence in the borough of Southport between March 12, 1913, and March 16, 1913, must be aggregated with her previous residence in the parish of Ormskirk from November 7, 1907, to January 25, 1911, and that the period thus aggregated fell to be reckoned as continuous residence in the county borough of Southport, which was the place where she resided immediately before the appointed day within the meaning of para. 3, sub-para. 3, aforesaid.

Quarter sessions was therefore of opinion that the order of the justices was wrong in point of law: that the poor person was resident in the county borough of Southport immediately before the appointed day; and that she had there acquired a status of irremovability. The question for the opinion of the Divisional Court was whether quarter sessions came to a correct decision in point of law.

The Divisional Court (Lord Hewart C.J., Avory and Talbot JJ.) allowed the appeal, holding that the poor person had on March 3, 1933, acquired a residence at Ormskirk, which had never been superseded, and that residence in Southport for one year next before that date as required by s. 93 of the Poor Law Act, 1930, for the purpose of acquiring a status of irremovability, had not been established. The Court further expressed the opinion that the Poor Law Act, 1930, contained a complete code dealing with settlement and removability, and therefore was not affected by the provisions of Part I. of Sch. IX. of the Local Government Act, 1929.

Lancashire County Council appealed.

S. G. Turner K.C. and *Basil Nield* for the appellants. It is submitted that at the material date, March 3, 1933, the poor person had acquired a status of irremovability in the county borough of Southport, and that the Divisional Court was wrong in holding otherwise. The Poor Law Act, 1930, is a consolidation Act, and as such can repeal nothing by implication, and as it contains no express repeal of those provisions of Part I. of Sch. IX. of the Local Government Act, 1929, which are headed "Settlement and Irremovability," those provisions are still in force. By para. 3, sub-para. 2, of Part I. of that Schedule "every person who at the appointed day has, or is in the course of acquiring, a status of irremovability from a poor law union, shall be deemed to have or to be in the course of acquiring a status of irremovability from the county or county borough in which the poor law union is comprised . . . . ," and by sub-para. 3 it is provided that "for the purposes of sub-paragraph (2) of this paragraph, consecutive periods of residence in two or more places within any poor law union which is not wholly comprised within one county or county borough shall be aggregated and reckoned as continuous residence in that part of the poor law union in which the person so resided immediately before the appointed day." By aggregating, in accordance with the provisions of that sub-paragraph, various periods, the poor person had twelve months' free residence in Southport, that is, residence without being in receipt of poor relief. That being so, she acquired a status of irremovability in Southport.

[As to the effect of a consolidation Act on previous legislation they referred to the Interpretation Act, 1889, s. 38, and Craies on Statute Law, 3rd ed., pp. 301 et seq.]

R. M. Montgomery K.C. and *G. G. Blackledge* for Southport Borough Council were not called upon.

GREER L.J. This is an appeal from a Divisional Court

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consisting of the Lord Chief Justice and Avory and Talbot JJ., who all agreed on the one decisive question. Only on very rare occasions have I found myself unable to agree with those eminent judges, whose views are always entitled to great weight, and in this case I am satisfied for the reasons given by them that for the decision of the question involved we must look only at the provisions of the Poor Law Act, 1930, and especially at the language of s. 104. It is true that the Poor Law Act, 1930, is a consolidating Act, but it is a consolidating Act which required some provisions which would make it applicable to the new circumstances created by the transfer of poor law functions from Boards of Guardians to county boroughs in respect of their poor and to county councils in respect of the poor outside the jurisdiction of the county boroughs. Taking that into account, the judges in the Divisional Court were right in regarding the Poor Law Act, 1930, as a code containing all the provisions necessary for determining the question where a poor person is settled and for determining whether or not he or she is irremovable. We have been pressed, as were the judges in the Divisional Court, by the provisions of the Local Government Act, 1929, which came into operation on the same day as the Poor Law Act, 1930, that is, on April 1, 1930. For my part I find it unnecessary to decide whether if we look at the provisions of the Local Government Act, 1929, the argument based on them is sound or not, as I think we are precluded by the express language of the Poor Law Act, 1930, from looking outside that Act for the determination of the question raised in this case. The decision of the Divisional Court was right, and this appeal must be dismissed.

SLESSER L.J. I am of the same opinion. In 1927 it was deemed expedient to consolidate the numerous Acts dealing with poor law administration concerning (inter alia) the subjects of settlement removability. So far there was no difficulty, but by the Local Government Act, 1929, the poor law authorities were altered: guardians and poor law unions were abolished and it was provided that the functions of each poor law authority should, except as otherwise provided by the Act, be transferred to county councils and county boroughs. That transference produced difficulties with regard to questions of residence and questions of irremovability, because the poor law unions previously in existence in some cases, as in this, covered areas which might be within the area of more than a county council or more than a county borough. In the present case it appears that Ormskirk Union included a parish in the county of Lancaster and also included the county borough of Southport. So two authorities instead of one became responsible for the area of the union. In those circumstances it was provided that there should be transitory and temporary provisions and adaptations to deal with that situation. By s. 132, sub-s. (1), it was provided that "the provisions set out in the Ninth Schedule to this Act (which relate to transitional and temporary matters) shall have effect for the purposes of this Act." One of the provisions in Sch. IX., Part I., headed "Transitional Provisions," namely that in para. 3, sub-para. 3, has been relied upon by Mr. Turner. I express no opinion whether if he could bring himself within that sub-paragraph he would or would not be entitled to succeed in this appeal, because in my view those transitional provisions were put an end to by the effect of s. 104 of the Poor Law Act, 1930, which in express terms says that "no person shall derive or acquire, or be deemed to have derived or acquired, a settlement or status of irremovability except in accordance with the provisions of this Part of this Act; and any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates." We have to apply that section to the facts of this case. It is conceded that under s. 93, sub-s. 1, of the Poor Law Act, 1930, the appellants cannot succeed if regard is paid only to its terms; but Mr. Turner says that the Act of 1930 is merely a consolidating Act, and he points to the fact that there is no express repeal of Sch. IX. of the Local Government Act, 1929. But when one considers the express and unambiguous language of s. 104 coupled with

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the fact that Part I. of Sch. IX. is headed "Transitional Provisions," obviously having regard to the fact that the local authority had changed its structure by reason of the Act of 1929, it is clear that there is no room for the application of any canon such as that stated in the Interpretation Act, 1889. It follows therefore that this appeal fails.

ROCHE L.J. I agree. In my judgment the provisions of the Local Government Act, 1929, and particularly Sch. IX., have no application to this case for the reasons already given. In view of that it is unnecessary to express any opinion as to the effect to be given to them if that point had arisen. Sect. 104 of the Poor Law Act, 1930, deals expressly with the question of settlement and the status of irremovability, and s. 94 provides when a person may be removed. It is found in the case that the settlement of the poor person within the meaning of that section was the county of Lancaster. The question remains, Was she removable or irremovable from the county borough of Southport at the material date? That question depends upon the construction of s. 93, the effect of which is that she is removable unless she had resided in that county borough for one year next before the application for the removal order. Residence in s. 93 means what Mr. Turner in his clear and able argument called free residence, that is residence without receipt of poor relief and not subject to other disabilities. A year, it is said, may be a composite year, but taking that construction of the statute this poor person never had a free residence in the county borough of Southport for one year at any time that is material. The full extent of her residence was eight or nine months. She was therefore removable, and the decisions of the court of summary jurisdiction and of the Divisional Court were right.

Appeal dismissed.

Solicitors for appellants: *Greenwell & Co., for Sir George Etherton, Clerk to the Council.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for R. E. Perrins, Town Clerk, Southport.*

J. S. H.

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Oct. 3, 4.

Poor Law—Transfer of Liabilities of Guardians to County Councils—Certificate of Value of non-institutional Liabilities by District Auditor—" Final and conclusive "—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *Sch. VI., cl.* 2, *sub-cl.* 2.

On the transfer of the functions of poor law boards of guardians to county councils, the certificate to those councils of his valuation of the non-institutional liabilities of the guardians by the district auditor under Sch. VI., cl. 2, sub-cl. 1, of the Local Government Act, 1929, is final and conclusive within the meaning of cl. 2, sub-cl. 2, of the said schedule, both as to the determination of what are the non-institutional liabilities and as to their value.

RULE NISI directed to Mr. Ayton, the district auditor, for a writ of mandamus directing him to give a certificate under cl. 2, sub-cl. 1, of Sch. VI. to the Local Government Act, 1929 (19 Geo. 5, c. 17) (1), so as to include certain items which he had omitted.

The facts of the case are taken from the affidavit of David Kenvyn Rees, town clerk of Cardiff.

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(1) Local Government Act, 1929, s. 113, sub-s. 1 : " Subject to the provisions of this Part of this Act with respect to property and liabilities for which special provision is made, any property and liabilities held or incurred by or on behalf of a poor law authority whose area is wholly comprised within one county or county borough shall on the appointed day by virtue of this section be transferred to, and vest in, the council of the county or county borough."

Sub-s. 2 : " Subject as aforesaid, the following provisions shall have effect in the case of a poor law authority whose area is not wholly comprised within one county or county borough—

(*a*) all institutional property of the authority shall . . . . be transferred and vest to and in [certain indicated county or county borough councils].

(*b*) all institutional liabilities of a poor law authority shall . . . . vest [as indicated].

(*c*) all non-institutional property and liabilities of a poor law authority shall on the appointed day . . . . be transferred and vest—(i) in the case of any right of recovery from any person of payments made or expenses incurred by the authority by way of poor relief, to and in [the indicated council] ; and

(ii) in the case of other property and liabilities, to and in the council of the county or county borough in which the portion of the poor law area having the

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By Part I. of the Local Government Act, 1929 (called herein "the Act"), the functions of all poor law guardians were as from the appointed day (April 1, 1930: see s. 134) transferred to county councils and county borough councils, and from that date all existing poor law guardians ceased to exist. Prior to April 1, 1930, the area of the Cardiff poor law guardians (called herein "the guardians") was not wholly comprised within one county or county borough, but comprised the area of the city and county borough of Cardiff and also part of the county of Glamorgan. Since that date the councils of the city and borough of Cardiff and of the county of Glamorgan have become the poor law authorities for their respective areas in accordance with s. 1 of the Act.

By s. 113 of the Act (1) provision is made for the transfer to the new poor law authorities of the property and liabilities of the guardians; such property and liabilities are institutional and non-institutional as defined by the Act (s. 113, sub-s. 3), and by s. 134 "property" and "liabilities" have the same

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larger or largest reduced rateable value is situate."

By sub-cl. (*d*) an apportionment of the non-institutional property and liabilities under (ii) must be made in accordance with Sch. VI.

Sub-s. 3: "For the purposes of this section and of the said Schedule:—'Institutional property' means all poor law institutions and offices and any other freehold or leasehold property whatsoever of a poor law authority [and other indicated property]. 'Institutional liabilities' means any outstanding liabilities for loans raised in respect of the provision, extension or equipment of any institutional property;

'Non-institutional property and liabilities' includes all property and liabilities of a poor law authority other than institutional property and institutional liabilities."

Sch. VI., cl. 2: "(1.) As soon as practicable after the appointed day the prescribed officer shall prepare in respect of each poor law area which was not wholly comprised within one county or county borough, and the district auditor for the audit district in which the poor law area was comprised shall certify to the councils of the counties or county boroughs into which the area extended, a statement showing the value as at the appointed day of the non-institutional property and liabilities of the poor law authority. . . . ."

Sub-cl. 2: "The certificate of the district auditor shall be final and conclusive: Provided that any such auditor may, if he thinks fit, give an interim or provisional certificate and may amend any final certificate given by him so far as appears to him necessary for the purpose of correcting any errors."

(1) See note (1) ante, p. 225.

meaning as in s. 100 of the Local Government Act, 1888. By the combined effect of ss. 113 and 134 the non-institutional property and liabilities of the guardians were transferred to the Cardiff Council, where the larger aggregate of rateable values on October 1, 1929, was situate: see s. 113, sub-s. 2 (*c*) (ii.), and s. 134. By s. 113, sub-s. 2 (*d*) (i.), an apportionment of the property and liabilities of the guardians must be made in accordance with Sch. VI., cl. 2, sub-cl. 1. By the same sub-cl. 1 it became the duty of the prescribed officer (the town clerk of Cardiff) to prepare a statement showing the value on April 1, 1930, of the non-institutional liabilities of the guardians, and the duty of the district auditor to certify them.

Under s. 119 of the Act a large number of the officers of the guardians were transferred to the above county and county borough councils and thereafter held office "by the same tenure and on the same conditions as immediately before" April 1, 1930 (s. 121, sub-s. 1). Under s. 2 of the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50) these officers were entitled to pensions out of the common fund on ceasing to hold office, having each, under s. 12 of that Act, contributed a percentage of his salary to the common fund, and they continued to have the same right after their transfer (see s. 124 of the Act of 1929). Since April 1, 1930, the Cardiff Council had been and in the future would be liable to pay these pensions. On March 31, 1930, the guardians were paying pensions to thirty-four officers under s. 2 of the Poor Law Officers' Superannuation Act, 1896, amounting in the aggregate to 3837*l.* 0*s.* 3*d.*

On January 5, 1934, the clerk to the guardians, the prescribed officer within cl. 2 of Sch. VI. to the Act of 1929, submitted to the district auditor a statement of the non-institutional property and liabilities of the guardians and a calculation of their value on April 1, 1930. Included were two items, 81,543*l.* 6*s.* 3*d.* being the prospective liability in respect of the above pensions of the officers transferred to the Cardiff Council, and 2410*l.* 6*s.* 10*d.* in respect of a similar liability in the case of those transferred to the Glamorgan County Council, with details. On January 6, 1934, the district

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auditor, in pursuance of the above cl. 2, purported to give a certificate of the value of the non-institutional property and liabilities of the guardians. In this certificate the district auditor removed and did not value the above two items, and stated: "In substitution for the said items removed I have annexed to the statement a schedule of superannuated officers at the appointed day with the amounts of their annual pensions set out against their respective names." He also stated: "I have also appended to the statement an explanatory memorandum of the total items comprising the foregoing figures of 81,543*l.* 6*s.* 3*d.* and 2410*l.* 6*s.* 10*d.*" His certificate read: "I do now certify in accordance with the provisions of clause 2 of Sch. VI. to the Local Government Act, 1929, that the foregoing statement as amended by me together with the schedule of pensions totalling 3837*l.* 0*s.* 3*d.* and existing at the appointed day shows the value at the appointed day of the non-institutional property and liabilities of the guardians of the poor of the Cardiff Union and to the best of my knowledge and belief is correct."

This rule was then obtained on the ground that this certificate was not a certificate showing the value of the property and liabilities within the meaning of the Act. It was submitted that the certificate must certify a capital sum so that the liabilities might be apportioned under cl. 3 of Sch. VI. It was not contended that the values of the above items were necessarily correct.

S. G. Turner K.C. and *Erskine Simes* showed cause. The certificate of the auditor was final and conclusive—Sch. VI., cl. 2, sub-cl. 2, of the Local Government Act, 1929—and is therefore not subject to review by mandamus. The auditor's duties are not merely ministerial but are judicial. It must be his first duty, before he can proceed at all, to ascertain what the non-institutional liabilities are that he has to value, and then, to value them. His conclusion on that matter is not subject to review, even if he were wrong in law; first, on ordinary principle, and, secondly, by virtue of cl. 2, sub-cl. 2, aforesaid. Mandamus will not issue to determine according to law but to hear according to law: per Darling J. in *Reg.* v. *Nicholson.* (1) Here the auditor heard the application, and he came to the conclusion that these liabilities were not non-institutional liabilities, and therefore not matter for a certificate. In *Westminster Corporation* v. *Gordon Hotels, Ld.* (2), where a statute enacted that the decision of a petty sessional court whether hotel refuse was " house refuse " within the meaning of the statute " shall be final," it was held that no appeal to a Divisional Court lay against their decision. The words of Sch. VI., cl. 2, sub-cl. 2, of the Act of 1929, " final and conclusive " are even stronger than those in the above case. The duties of the prescribed officer and of the auditor are of the same kind, but the latter must come to an independent conclusion.

It is the liability of the guardians on the appointed day and not that of the new authority which has to be valued, and that means something which is capable of being made certain; the present as distinguished from contingent liability. Owing to the many contingencies which would affect the probability of an eventual claim of an officer to a pension—e.g., his death, resignation, discharge for misconduct, transfer, etc.—it is impossible to value the liability to pay it; it is possible only for the actuary to express an opinion or to estimate.

[*Nash* v. *Rochford Rural District Council* (3) was also referred to.]

Micklethwait K.C. and *A. W. Cockburn* showed cause for Glamorgan County Council. These pensions are really deferred pay, and it would be unfair that the county council should be liable to pay them.

Montgomery K.C. and *Trustram Eve* in support. An actuarial valuation of this liability is possible. These particular guardians have had some thirty-five years' experience of pensions figures, apart altogether from the experience of other boards of guardians. On the point that they are not capable of actuarial valuation it is desired to put in the affidavit of an actuary. [Leave was refused.]

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(1) [1899] 2 Q. B. 455, 461.

(2) [1907] 1 K. B. 910.

(3) [1917] 1 K. B. 384, 400.

The certificate of the auditor is only final and conclusive in respect of the matters which the Act of 1929 leaves for his decision. That Act left to him the valuation (inter alia) of non-institutional liabilities. But it was not for him to decide whether a liability was institutional or non-institutional, for that was a matter of law on the construction of the Act. If he certifies the value of something which is not such a liability, or refuses to value something which is, then his certificate is not final and conclusive. Here he has done the latter. It is admitted that the value he puts on what are liabilities under the Act is final and conclusive. "Value" means capital value, which should have been certified.

LORD HEWART C.J. This is a rule nisi for a writ of mandamus to be directed to the district auditor for the audit district of Cardiff, commanding him to give a certificate to include items which it is said he has excluded from his purported certificate dated January 6, 1934, and to state the capital value of certain pensions, of which he has merely given a list, upon the ground that he has not given a certificate of the value of non-institutional liabilities as required by Sch. VI., cl. 2, sub-cl. 1, to the Local Government Act, 1929. The question, which has been argued with great ability on both sides, arises under a comprehensive and varied statute called the Local Government Act, 1929. By s. 1 of that statute, dealing with poor law, it is provided: "On the appointed day the functions of each poor law authority, shall, subject to the provisions of this Act and except as otherwise expressly provided by this Act, be transferred to the council of the county or county borough comprising the poor law area for which the poor law authority acts, or, if the poor law area is not wholly comprised within one county or county borough, the functions of the poor law authority so far as they relate to any county or county borough into which the area extends shall be transferred to the council thereof, and as from the appointed day all then existing poor law authorities shall cease to exist." Afterwards the statute, having dealt with other topics, deals in Part VII. with property, liabilities and officers, and first of all with transfer of property and liabilities. By s. 113, sub-s. 1, the Act provides: "Subject to the provisions of this Part of this Act with respect to property and liabilities for which special provision is made, any property and liabilities held or incurred by or on behalf of a poor law authority whose area is wholly comprised within one county or county borough shall on the appointed day by virtue of this section be transferred to, and vest in, the council of the county or county borough." Then follow provisions with regard to alternatives, which have been fully discussed in argument, and which need not now be referred to. The section in sub-s. 2 draws a distinction between what is called "institutional" property and liabilities on the one hand, and "non-institutional" property and liabilities on the other hand, and the definition in sub-s. 3 of "non-institutional property and liabilities" is as follows: "'Non-institutional property and liabilities' includes all property and liabilities of a poor law authority other than institutional property and institutional liabilities." Then by cl. 2, sub-cl. 1, of Sch. VI., which is referred to in s. 113, sub-s. 2 (*d*), which requires an apportionment to be made as soon as practicable after the appointed day, which was April 1, 1930 (s. 134), it is provided as follows: "As soon as practicable after the appointed day the prescribed officer"—that is the clerk of the authority (Sch. VI., cl. 5 (*a*))—"shall prepare in respect of each poor law area which was not wholly comprised within one county or county borough, and the district auditor for the audit district in which the poor law area was comprised shall certify to the councils of the counties or county boroughs into which the area extended, a statement showing the value as at the appointed day of the non-institutional property and liabilities of the poor law authority, other than any right of recovery from any person of payments made or expenses incurred by the poor law authority by way of poor relief." Then follows this provision (cl. 2, sub-cl. 2): "The certificate of the district auditor shall be final and conclusive." There is a provision (cl. 2, sub-cl. 2) for amendment by the district auditor if he thinks amendment necessary for the purpose of correcting any errors, but subject to that proviso, the certificate of the district auditor shall be final and conclusive. As appears from the affidavits, and the correspondence annexed to the affidavits, the prescribed officer did prepare a statement of the values, as at the appointed day, of the non-institutional property and liabilities of the guardians of the poor of Cardiff union, and that statement included under the head of "Liabilities" two sums, 81,543*l.* odd and 2410*l.* odd, relating to prospective liability to superannuation in respect of officers to be in receipt of superannuation allowance and also relating to officers transferred to the Cardiff City Council, and in like manner prospective liability to superannuation in respect of officers transferred to the Glamorgan County Council. The larger sum, as might be expected, referred to the Cardiff City Council, and the smaller sum to the Glamorgan County Council. The district auditor having that statement before him struck out both of those items, and added these observations: "I have after careful consideration removed from the foregoing statement the items of 81,543*l.* 6*s.* 3*d.* and 2410*l.* 6*s.* 10*d.* entered therein by the prescribed officer and in substitution for the said items removed I have annexed to the statement a schedule of superannuated officers at the appointed day with the amounts of their annual pensions set out against their respective names"—and then the district auditor proceeds to say: "I have also appended to the statement an explanatory memorandum of the detailed items comprising the foregoing figures of 81,543*l.* 6*s.* 3*d.* and of 2410*l.* 6*s.* 10*d.*" Then come the words, "and I do now certify." Now, what is it that the district auditor certifies? He says: "I do now certify in accordance with the provisions of clause 2 of the Sixth Schedule to the Local Government Act, 1929, that the foregoing statement as amended by me"—that is to say, omitting the two large figures already referred to—"together with the schedule of pensions totalling 3837*l.* 0*s.* 3d. and existing at the appointed day shows the value at the appointed day of the non-institutional property and liabilities of the guardians of the poor of the Cardiff Union and to the best of my knowledge and belief is correct." The point of difference and contest between the Cardiff Corporation, on the one hand, and the county council of Glamorgan, on the other hand, is whether those two large items should be omitted. They are, as appears from the documents, items relating to what is sometimes called "prospective liability" and sometimes called "potential liability," and what the district auditor has done is to eliminate payments which may, or may not, be made in the future—a future which may never occur—dealing only with existing or actual liabilities at the date April 1, 1930, and has appended a statement showing the persons to whom the payments were to be made, and were being made, and the amount in each individual case of those payments. The argument made by Mr. Montgomery is that this document, which purports to be a certificate, fails in two main respects: in the first place, it does not regard potential or prospective liability, and, in the second place, it sets out with regard to a liability admittedly existing at the appointed day, not a capital sum, but a total of payments to be made year by year.

The question which we have to consider first of all is whether this is a certificate within the meaning of the Act. I agree that the question is by no means easy, but it is to be observed that in cl. 2 of Sch. VI. what the district auditor has to certify is a "statement showing the value," and I cannot help thinking that if the Legislature had meant capital value, it would have said capital value. Therefore, I think that so far as the criticism is directed to the statement showing pensions totalling 3837*l.* odd Mr. Montgomery's criticism fails. I think that the value is shown. But then it is said—and this is, I think, the major criticism—that the district auditor has taken upon himself to exclude what are sometimes described as potential, and sometimes as prospective, liabilities. Now it is admitted that the functions of the district auditor are not merely ministerial. It is admitted that if the statement prepared by the prescribed officer had failed to include items which ought to have been included, the district auditor might, in his discretion, have included them; but it is argued that the district auditor may not take upon himself the burden of saying that sums which the

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prescribed officer has shown as liabilities are not liabilities within the meaning of cl. 2 of Sch. VI. That argument seems to me to be difficult to accept, and I cannot help thinking that it was precisely in order to avoid questions, and the cost of questions, of that and of a similar nature, that this statute has provided that the certificate of the district auditor shall be final and conclusive. It seems to me that it is a certificate, and I think it is the duty of this Court to hold, as the statute directs, that it is final and conclusive. The alternative is a very difficult alternative. It really amounts to this, that this Court should direct the district auditor upon the question what is to be contained and what is to be omitted; in other words, that this Court should resettle for him, or through him, the statement showing the value as at the appointed day of the non-institutional property and liabilities of the poor law authority. I think light is thrown upon the meaning of the words "final and conclusive" by the well known case of *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) In that case the words of s. 33, sub-s. 2, of the Public Health (London) Act, 1891, were: "The decision of that court"—that is to say, a petty sessional court—"shall be final," and Cozens-Hardy M.R. said (2), after reading the words of that sub-section: "It is scarcely possible to imagine words more strong, or which apparently more completely negative the right of any tribunal to review a decision of the magistrate." That judgment of the Court of Appeal was affirmed by the House of Lords. (3) It is quite true that by s. 134 of the Act of 1929, with which this Court is now concerned, the word "liabilities" is to bear the meaning which it bears under the Local Government Act, 1888; but there again I think light is thrown upon the matter by the judgment of Scrutton L.J. to which our attention has been directed, in the case of *Nash* v. *Rochford Rural District Council* (4): "The latter words"—that is, "liabilities . . . . subsequently accruing"—"point to bills of exchange and similar obligations where a liability arises from acceptance accruing due at a future date. Indeed, as the

(1) [1907] 1 K. B. 910.
(2) Ibid. 913.
(3) [1908] A. C. 142.
(4) [1917] 1 K. B. 384, 401.

definition of 'liability' includes liability to punishment, it should obviously be construed strictly." Now I do not propose to enter upon the question whether the district auditor in the course which he has taken here is in all respects right. I do not conceive that that is the question for us. I am satisfied that he has made a certificate, and I think it is our duty loyally to observe the words of Sch. VI., cl. 2, sub-cl. 2, of this statute: "The certificate of the district auditor shall be final and conclusive."

I would add one further observation upon the point that "value" means "capital value." I think it is not without significance that a few lines lower down, namely, in cl. 4, sub-cl. 1, of Sch. VI. one finds these words: "Any sum required to be paid from one council to another for the purpose of effecting an adjustment under this schedule may be paid either by way of annual payments or by way of a single payment." I think, therefore, the true conclusion here is that this rule ought to be discharged.

Branson J. I agree. The district auditor under his hand on January 6, 1934, certified a statement purporting to be under clause 2 of Sch. VI. to the Local Government Act, 1929. If that document is a certificate of the district auditor, it is, by clause 2, sub-cl. 2, of that schedule final and conclusive. But it is said on behalf of the Cardiff Corporation that it is not a certificate within the meaning of that provision in the statute, first of all, because the statement does not contain all the liabilities of the board of guardians, and secondly, that the liabilities are defined by the statute, and if it can be shown that there is a liability which the district auditor has not included in the statement, then his certificate is not a certificate which is conclusive under Sch. VI., clause 2, to the Act. In my view that argument is unsound. What the clause says is that the prescribed officer is to prepare a statement showing the values and the district auditor is to certify the statement showing the values, and I cannot understand how a man can certify a statement showing the values without first deciding what is to be included in that statement. If his certificate is conclusive as to the value, I can see no reason why it is not to be conclusive also as to the statement, in the sense that it is conclusive that the right items have been included in it. If I am correct in that view, then, as my Lord has said, all that remains for this Court to do is loyally to follow the direction of the statute and to treat the certificate as a final and conclusive one. With regard to the other point, that by adding a statement containing a schedule of the superannuated officers and the amounts of their annual pensions set out against their respective names the district auditor has failed in his duty and has rendered his certificate no certificate under the Act because he ought to have put a capital value upon the pensions, I agree entirely with what has already been said by my Lord, and I have nothing further to add upon that. For these reasons I agree that the rule should be discharged.

DU PARCQ J. I agree, and I desire to add some words of my own only in deference to the argument of Mr. Montgomery. I agree first that this certificate of the district auditor is final and conclusive. As I understood Mr. Montgomery's argument on that point, it was this. He says it is quite true that the Act of Parliament provides that the district auditor's certificate as to value is final and conclusive, but the Act of Parliament means this, that the non-institutional liabilities are those liabilities which the Act of Parliament states and, to some extent, defines, and that upon those liabilities the district auditor must put a value. He is not able, according to Mr. Montgomery's argument, to vary what the Act of Parliament has laid down as to what are non-institutional liabilities, and if a question arises about that, there is nothing in the Act of Parliament to prevent this Court from exercising what may be thought to be its proper function and declaring what the Act of Parliament means. Now, Mr. Montgomery was asked in the course of his argument what would be the district auditor's duty if the prescribed officer submitted to him a statement which omitted certain liabilities which in the view of the district auditor ought to be included in it, and Mr. Montgomery answered that it would be the district auditor's duty to include them in the statement which he certified, and I think that that was a correct answer; in other words, the duty of the district auditor is not limited to putting a valuation upon items set before him by the prescribed officer. The provisions of cl. 2 of Sch. VI. to the Act of 1929 also impose upon him the duty of deciding what items are to be included in the list of liabilities. The prescribed officer prepares a statement, and the district auditor certifies the statement, and the statement certified by the district auditor will no doubt be based upon that prepared by the prescribed officer, but it by no means follows that it will be identical with it, either as to items or values. If this be the right view of the provisions of Sch. VI., then it seems to me to follow that the district auditor, when he certifies the statement for which he is responsible, certifies that it is correct both as to value and as to items. On both points there may be much room for argument and difference of opinion. The Legislature has abridged argument and has resolved doubt by enacting that the district auditor's certificate shall be final and conclusive. Taking the view of the section which I have endeavoured to express, I am forced to the conclusion that the certificate is no less final and conclusive as to the inclusion or exclusion of items than it is as to the values to be placed upon them. Taking that view, I agree entirely with what was said by my Lord, that nothing would be gained by expressing any opinion upon the question whether the district auditor has taken a right view or a wrong view. Indeed I think that if the district auditor's decision is final and conclusive it would be worse than useless for the Courts to lay down the rules which in their opinion he ought to follow.

The only remaining question about which I think I should like to say a word is the question whether the district auditor has failed to comply with the Act because he has not placed a capital value upon the liabilities, the nature and extent of which is shown in the list which is before us. I agree with my Lord that that statement, taken together with the rest of the certificate, may truly be said to show the value as at the

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appointed day of the non-institutional liabilities. We have been told by Mr. Micklethwait, representing the Glamorgan County Council, that no question arises as to that. It is quite plain, in my view, that the district auditor has said that those liabilities are part of the non-institutional liabilities as at the appointed day, and I am not satisfied by the argument that in order that a statement made should show the value of liabilities it must place upon each liability a capital value. For these reasons I agree with the judgment proposed by my Lord.

Rule discharged.

Solicitors showing cause: *Sharpe, Pritchard & Co., for T. D. Windsor Williams, Neath (Cardiff Corporation); Torr & Co., for D. J. Parry, Cardiff (Glamorgan Corporation).*

Solicitors in support: *Smith, Rundell, Dods & Bockett, for D. Kenvyn Rees, Cardiff.*

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Nov. 7, 13.

BARRETT v. LONDON GENERAL INSURANCE COMPANY, LIMITED.

Insurance—Motor car—Third party risks—Exception of liability while car driven in "unsafe or unroadworthy condition"—Time in respect of which condition must be considered—Commencement of journey.

By a policy of motor-car insurance the defendants agreed to indemnify the assured against third-party risks, "liability in respect of any accident while driving the car in an unsafe or unroadworthy condition" being excluded:—

Held, that, applying the principle of marine insurance that there is an implied warranty that a ship is seaworthy at the time of sailing but no warranty that she shall continue seaworthy throughout the voyage, the policy must be taken to mean that, for the assured to be covered by it, the car must be roadworthy when it set out on its journey but need not continue to be roadworthy throughout the journey. An assignee of the assured was, therefore, entitled to recover in an action against the defendants on the policy where the defendants (on whom lay the onus of

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proving unroadworthiness) failed to prove that the car was unroadworthy when it began its journey and only showed that, by reason of a defective brake, it was unroadworthy at the time of the accident.

Action tried by Goddard J., without a jury.

By a policy of insurance dated November 3, 1932, the defendants, the London General Insurance Co., Ld., agreed to indemnify one Graham Coutts Tempest Stone from noon on October 22, 1932, to noon on January 22, 1933, against (inter alia) liability to a third party, including liability at law for compensation (including law costs awarded and taxed or agreed of any claimant) for the death of or bodily injury to any person not being the driver of the motor-car specified in the policy, or a person in the service of the insured, and not being a member of the insured's family or residing with him, caused by the motor car while in use by the insured. On December 24, 1932, Graham Coutts Tempest Stone, when driving the motor-car, negligently knocked down and killed one Ernest William Barrett, who was not the driver of the car, or a person in the service of the insured, or a member of the insured's family, or residing with him. By a judgment dated February 13, 1934, in the King's Bench Division of the High Court of Justice, it was ordered that Graham Coutts Tempest Stone should pay 650*l.* damages and costs taxed at 6*l.* 17*s.* 1*d.* to Kate Barrett, the widow of the dead man and the plaintiff in the present action. On May 28, 1934, Graham Coutts Tempest Stone, he not being in a position to pay and the defendants having repudiated liability, assigned to the plaintiff the said sums of money which were alleged to be due to him under the policy. The plaintiff, accordingly, brought this action to recover the said sums with costs and interest from the defendant company.

The defendants by their defence denied that they were ever liable to pay to Graham Coutts Tempest Stone either of the sums claimed, or any part thereof, on account of the judgment or under the policy or at all. They referred to the following clause in the policy: "This policy does not cover or insure against liability in respect of any accident

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while driving the car in an unsafe or unroadworthy condition," and alleged that at the time of the accident and at all material times prior thereto the car was being driven in an unsafe and unroadworthy condition in that the brakes were defective and dangerous.

Horner for plaintiffs.

De Winton (*Doyle* with him) for defendants.

Cur. adv. vult.

1934. Nov. 13. GODDARD J. read the following judgment: I reserved judgment in this case because it raises a point of interest on the construction of a somewhat common exclusion in motor-car policies. Although when Part II. of the Road Traffic Act, 1934, is in force, it appears that the point under discussion will no longer affect or prejudice the injured party, the same question that falls for decision in this case may still arise between the assured and the insurance company.

His Lordship having said there was no doubt that the accident was caused by the foot brake failing at the critical moment and that the only evidence before him was that at the moment of the accident the car was unsafe and unroadworthy, continued: The question is whether the exclusion absolves the defendants from liability when all that they have proved is that at the moment of collision the vehicle was in such a condition. Both counsel said that they knew of no authority on this point, and no cases were cited. I have been unable to find any case relating to the insurance of motor-cars or other vehicles in which this or a similar exclusion has been considered, but I think that considerable assistance can be obtained from well settled principles in marine insurance law relating to seaworthiness.

Let me first say that the addition of the word "unsafe" to the word "unroadworthy" seems to me to add nothing. If a vehicle be unsafe, it is unroadworthy, and vice versâ, and "unroadworthy" seems to me to imply the same state in relation to a road vehicle as "unseaworthy" does to a vessel. It is elementary in marine insurance that the owner of the vessel impliedly warrants that it is seaworthy. So far as I know, it has not yet been decided whether there is the same implied warranty in the case of a motor-car, but it seems to me that the object of the exclusion is to put the underwriters of a motor-car policy in the same position in this respect as those of a marine policy. It matters not, in the result, whether the protection is given to the insurers by means of a warranty, express or implied, or by an express clause exempting them if the vehicle or vessel is not fit for the element, be it land or sea, on which it is to be used. Now, it is settled law that, while there is an implied warranty that a ship is seaworthy at the time of sailing, there is no warranty that she shall continue seaworthy throughout the voyage. In *Dixon* v. *Sadler* Parke B. said (1): "In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against." The same doctrine was re-affirmed by him when, as Lord Wensleydale, he delivered the opinion of the Judicial Committee in *Biccard* v. *Shepherd*. (2)

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(1) (1839) 5 M. & W. 405, 414. The decision of the Court of Exchequer was affirmed in 1841 by the Court of Exchequer Chamber: see (1841) 8 M. & W. 895.

(2) (1861) 14 Moo. P. C. 471, 493.

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In my judgment, this doctrine should apply to the clause I am now considering, and it should be read as meaning that the car must be roadworthy when it sets out on its journey. Were it otherwise, consider what the result would be. I cannot do better than quote the courageous illustration given by Mr. De Winton in the course of his argument. He said that if a stone, or something of that nature, caused a fracture of the brake cable during the course of the journey, and an accident to a third party immediately followed because the brake in consequence failed, the underwriters would not be liable. Every one knows that in a motor car something may give or go wrong in the course of the journey which may, temporarily at any rate, put the car out of control, and that from a variety of causes, and if in such circumstances this exclusion is to relieve the underwriters, it seems to me that the indemnity given by the policy would be exceedingly precarious. The onus of proving unseaworthiness and, therefore, unroadworthiness, is on the underwriters: see *Davidson* v. *Burnand*. (1) It is not enough for them to prove that the vessel was unseaworthy at the moment of the disaster, as that would mean that the warranty continued throughout the journey. There are, no doubt, many cases which show that where a ship meets with disaster soon after sailing without the intervention of bad weather or other adequate cause, a presumption of unseaworthiness arises: see, for instance, *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co., Ld.* (2); *Lindsay* v. *Klein*. (3) But a ship and a motor-car are two very different things, and I do not think that what would raise a presumption in the case of the one would necessarily raise it in the case of the other. If, however, it were found that on leaving, or within quite a short distance of the garage, the brakes refused to act, or some other mechanical defect showed itself, it would, I think, be a fair inference to draw that the car was not roadworthy when it set out. There was no evidence here, however, to show how far or how long on the day in question the car had been driven, and Mr. Stone may have been driving for five minutes or five hours. He may have gone half a mile or fifty miles. The defendants have proved no more than that when he attempted to put on his brake it failed because the cable and nipple either then parted or had parted at some time before. I have already commented on the conflicting and unsatisfactory evidence given by the defendants on this matter, and as they have failed to satisfy me that the car was unsafe or unroadworthy when it set out on its journey on the day in question, I hold that the plaintiff is entitled to recover.

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(1) (1868) L. R. 4 C. P. 117.
(2) [1901] A. C. 362.
(3) [1911] A. C. 194.

One other matter was argued, which I mention to show that I have not overlooked it. Mr. Horner submitted that, as it was agreed that the car had an efficient hand brake, the car could not be said to be unsafe or unroadworthy even though the foot brake was defective. I do not agree with that contention. No doubt the accident might have been avoided had Stone used his hand brake, but that is not decisive of this case against the underwriters. In my opinion, it would be impossible to hold that a car put on the road with one of its braking systems wholly ineffective was otherwise than in an unsafe condition.

The plaintiff will have judgment for 656*l.* 17*s.* 1*d.*—that is to say, 650*l.* damages and 6*l.* 17*s.* 1*d.* the costs already awarded in the last case, and such costs as are awarded to a poor person.

Judgment for plaintiff.

Solicitors for plaintiff: *Biddle, Thorne, Welsford & Gait.*
Solicitors for defendants: *Kingsley Wood, Williams & Co.*

G. F. L. B.

C. A.

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Oct. 8.

WHITE *v.* BEMBRIDGE.

Landlord and Tenant—Rent Restriction—Dwelling-house—Decontrol—Rateable Value—Ascertainment—Part of dwelling-house used for Public Purposes—Exemption from Rates—Remainder of dwelling-house rated at less than 45l.—Onus of Proof—Entry in Valuation List—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 1, *sub-s.* 2; *s.* 16, *sub-s.* 1.

By s. 1, sub-s. 2, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: "As from the twenty-ninth day of September, 1933, the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed —(*a*) in the metropolitan police district or the City of London, forty-five pounds. . . . ."

By s. 16, sub-s. 1, "Appointed day" means, as respects the administrative county of London, the sixth day of April, 1931, and "'Rateable value on the appointed day' in relation to any dwelling-house means . . . . the value shown, with respect to that dwelling-house on that day in the valuation list then in force, as the rateable value or, where the net annual value differs from the rateable value, as the net annual value."

In an action brought by landlords to recover arrears of rent of a dwelling-house, the tenant claimed that the landlords were not entitled to recover the full amount of the arrears on the ground that the house had become decontrolled by the Act of 1933. In support of his claim he produced a copy of the following entry appearing in the quinquennial valuation list for 1930 with respect to the premises: "ground floor exempt, rooms on first floor are of gross value 16*l.*, rateable value 12*l.*":—

Held (reversing the decision of the county court judge), that the tenant had failed to show that the house was still controlled; that the onus of showing that the rateable value was less than 45*l.* a year was on him; and that he had not discharged that onus by putting in evidence an entry in the valuation list showing that part of the premises was exempted from rates and that the remaining part was rated at less than 45*l.* a year.

APPEAL from Lambeth County Court.

By a lease dated in 1922 a dwelling-house, No. 90 Lordship Lane, East Dulwich, was demised to the defendant's predecessor for a term of twenty-one years at a rent of 75*l.* a year for the first seven years, 85*l.* a year for the second seven years, and 95*l.* a year for the third seven years. On September 6, 1923, the premises were assigned to the defendant. The defendant having paid two quarters at the rate reserved, the defendant and plaintiffs then realized that this was in excess of the standard rent, and the defendant thereafter paid the standard rent of 57*l*. 10*s*.

The present action was brought by the plaintiffs to recover two quarters' arrears of rent due on December 25, 1933, and March 25, 1934, respectively, and raised the question whether the house had been " decontrolled " by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

By s. 1, sub-s. 2, of that Act it is provided that " As from the twenty-ninth day of September, 1933, the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed—(*a*) in the metropolitan police district or the City of London, forty-five pounds. . . . ." By s. 16, sub-s. 1, " 'Appointed day' means, as respects the administrative county of London, the sixth day of April, 1931," and " 'Rateable value on the appointed day' in relation to any dwelling-house means . . . . the value shown, with respect to that dwelling-house on that day in the valuation list then in force, as the rateable value or, where the net annual value differs from the rateable value, as the net annual value."

In 1920 the house appeared in the quinquennial valuation list at a gross value of 50*l*. and a rateable value of 42*l*. In 1925 the figures were 60*l*. and 47*l*. respectively.

At some date between 1925 and 1929 the defendant began to use the ground floor of the premises as a post office. On the ground that premises used for public purposes are exempted from rates he obtained an amended valuation in 1929, and in a provisional list made in that year the entry in respect of the premises was " ground floor exempt, rooms on first floor are of gross value 16*l*., rateable value 12*l*." A similar entry appeared in the quinquennial list made in 1930.

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The plaintiffs contended that the house was decontrolled by the Act of 1933. The defendant contended that the rateable value must by reason of s. 16, sub-s 1, of the Act be taken to be the value shown by the valuation list—namely, 12*l.*, and therefore that the house was still controlled.

The county court judge accepted the defendant's contention and dismissed the action.

The plaintiffs appealed. The appeal was heard on October 8, 1934.

Hon. S. O. Henn Collins K.C. and *H. Heathcote-Williams* for the appellants.

Viscount Erleigh K.C. and *S. Parnell Kerr* for the respondent.

LORD HANWORTH M.R. This appeal will be allowed. It raises what we are told is an unusual point, and I think that is an accurate description of it.

The action was brought to recover two quarters' rent due on December 25, 1933, and Lady Day, 1934, respecting the premises known as 90 Lordship Lane, East Dulwich. The lease was dated June 6, 1922, and was for a term of twenty-one years at a rent which by seven yearly periods rose from 75*l.* to 85*l.*, and then to 95*l.* for the remainder of the term. The amount sued for was 42*l.* 10*s.*, based on the appropriate rent due under the indenture of lease. There is no doubt, and the facts are not in dispute, that the defendant is the occupier of 90 Lordship Lane and that under the terms of the lease he is liable to pay this sum in the circumstances in which he is being sued. But he says in his defence that by virtue of the Rent Restriction Acts the landlords are not entitled to recover the full amount claimed because the rateable value of the premises is less than 45*l.* He says that he can establish the fact that the premises are still controlled and still subject to the Rent Restriction Acts.

It must be remembered that those Acts were passed for the purpose of preventing the rent of dwelling-houses being increased, or standing at a higher amount than the standard rent. Their purpose was to intervene between landlord and

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tenant in order to control the rent payable to the landlord. By the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the Legislature made an effort to put an end to some of the restrictions imposed by the earlier Acts. Sect. 1, sub-s. 2, provides : " As from the twenty-ninth day of September, 1933, the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed—(*a*) in the metropolitan police district or the City of London, forty-five pounds." In order that the principal Acts shall continue to apply, the conditions in the proviso must be complied with.

It is plain that the opening words of the sub-section—namely, that the principal Acts shall not apply, are an over-riding statement of the law, and restore the relationship of landlord and tenant to the contract made between them unless the tenant can establish that the case falls within the proviso. For the purpose of seeing whether it does so or not, I turn to the interpretation section, s. 16, which states : " ' Rateable value on the appointed day ' in relation to any dwelling-house means . . . . the value shown, with respect to that dwelling-house on that day in the valuation list then in force, as the rateable value or, where the net annual value differs from the rateable value, as the net annual value."

It was contended by counsel for the respondent that they have established their case, and have discharged the onus which lies on them, and have prevented the earlier part of s. 1, sub-s. 2, from operating, by putting in evidence an entry in the valuation list which shows these premises to be of a less rateable value than 45*l*. I turn, therefore, to the valuation list and find this entry with regard to these premises—that the ground floor is exempt from rating, and that the rooms on the first floor are rated at 16*l*. gross and 12*l*. net.

But the premises in respect of which the rent arises are not merely the ground floor, or the first floor ; they are the

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whole of the premises on both the first and ground floors. The entry in the valuation list shows that, for reasons which seemed good and sufficient to the rating authority, there has been no entry at all of the value of the space on the ground floor, because that ground floor was not subject to valuation, and all that has been valued are the rooms on the first floor. It cannot, therefore, be said that there is in the valuation list in force on the appointed day a rateable value or a net value stated for the premises as a whole.

We are told that this entry is the only evidence of rateable value which we are entitled to consider. If that be so, it fails to support the respondent's contention, as it does not contain the information required in respect of the dwelling-house which is the subject-matter of the demise, but only with regard to part of it, for the ground floor is excluded. In other words, the statute has failed to come to the rescue of the respondent, and he is thus left subject to the terms of his contract with the landlords. He must therefore pay the sum due under the contract, it being impossible to show that the contract has been overridden by the Rent Restrictions Acts.

The appeal will be allowed, and there will be judgment for the appellants, with costs here and below.

ROMER L.J. I agree and have nothing to add.

GODDARD J. I agree.

Appeal allowed.

Solicitor for appellants: *Herbert A. Phillips.*
Solicitors for respondent: *Kingsbury & Turner.*

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Local Government—Declaration by Local Authority of unhealthy Area to be a Clearance Area—Clearance Order—Submission to Minister of Health for confirmation—Objections by Owners—Public Local Inquiry—Subsequent Private Inquiry held by Officials of Ministry in absence of Owners—Reception by Ministry, without notice to Owners, of evidence as to condition of houses—Confirmation of Clearance Order by Minister—Interests of Owners substantially affected—Confirmation Order quashed—Quasi-judicial Functions of Minister—Housing Act, 1930 (20 & 21 *Geo.* 5, *c.* 39), *ss.* 1, 2, 11; *First Schedule, para.* 4.

Where a local authority has made a clearance order under s. 1 of the Housing Act, 1930, and has submitted the order to the Minister of Health for confirmation, and objections are made thereto by the owners, the Minister must comply with the provisions of para. 4 of the First Schedule to the Act of 1930, and cause a public local inquiry to be held, and consider any objections not withdrawn and the report of the person that held the inquiry. In deciding whether or not he shall confirm the clearance order the Minister occupies a quasi-judicial function and must not take into consideration any matters other than those mentioned in para. 4 of the First Schedule. If the Minister holds a private inquiry to which the owners are not invited or takes into consideration ex parte statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice, and his confirmation of the clearance order would not be within the powers conferred upon him by the Act, and the owners would be entitled as being persons aggrieved to have the confirmation order quashed.

Dicta of Lord Loreburn L.C. in *Board of Education* v. *Rice* [1911] A. C. 179, 182, and of Viscount Haldane L.C. in *Local Government Board* v. *Arlidge* [1915] A. C. 120, 132, applied and followed.

APPEAL from a decision of Swift J.

On February 23, 1933, the Jarrow Corporation, acting under the Housing Act, 1930, made a clearance order in respect of the buildings in a certain area and submitted the same to the Minister of Health for confirmation. The Order was entitled "North Ward No. 1 Clearance Order, 1933."

On April 13, 1933, notice was published by the local authority in accordance with the provisions of the Act, and served upon the owners of the property comprised within the clearance order, including the appellants.

On April 26, 1933, the appellants gave notice of objection

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to the clearance order on the following grounds (inter alia): "(1.) The dwelling-houses in the area are in good repair and sanitary condition and fit for human habitation." "(4.) The expense to the local authority if the order is confirmed will be more than the town can bear at the present time." "(5.) The local authority cannot provide or secure the provision of accommodation for the persons of the working classes who will be displaced by the clearance of the area within the time specified in the order for the premises to be vacated, nor does such accommodation already exist." "(6.) In any event the demolition of all the buildings in the area is not the most satisfactory method of dealing with conditions in the area."

The Minister of Health in accordance with the provisions of the Housing Act, 1930, caused a public local inquiry to be held on May 31 and June 1, 1933, by Mr. Collin, an Inspector appointed by him. During the course of the inquiry it was suggested that an agreement might be arrived at between the Medical Officer of Health and the owners as to the repairs which would be required in order to make the houses reasonably fit for habitation, and negotiation proceeded with this object.

On September 6, 1933, a further meeting was held at Jarrow at which representatives of the owners were present as well as representatives of the Corporation, and Mr. Collin suggested that the owners should submit particulars of what they were prepared to do.

Some agreement appears to have been arrived at between the officials of the corporation and the owners as to the repairs that would be required to make the houses habitable for a considerable number of years. The Corporation, however, maintained that the proper way of dealing with the situation was for the Minister to confirm their clearance order, and they passed resolutions to that effect and communicated those resolutions to the Ministry of Health in London. The Town Clerk sent various communications to the Minister with additional evidence from the Medical Officer of Health on which the Minister was asked to confirm the Clearance Order which the corporation had made.

On November 8, 1933, Mr. Kerwood wrote, on behalf of the Minister, to the Town Clerk a letter in which he proposed that the Town Clerk and the Medical Officer of Health and the Surveyor should call at the Ministry and discuss with the officials of the Ministry how the proposals of the owners might be carried out. The officials of the Corporation attended at the Ministry on November 17 and had a conference with Mr. Kerwood and Mr. Collin, the inspector who held the inquiry. The officials of the Ministry then expressed the opinion that whilst the houses in their present condition were not suitable for habitation it was not impossible to make most of them fit for another 15 or 20 years by doing very substantial repairs amounting in some cases to reconstruction. It was suggested that the Borough Engineer and the Medical Officer of Health should draw up a schedule of the work necessary to be done in respect of each house, and that the owners be asked to give an undertaking to carry out such work within a reasonable time, and that if the owners would not give such undertaking the Minister would confirm the clearance order.

The Corporation, however, disagreed entirely with the proposals suggested by the Ministry, and on January 3, 1934, they asked that the Minister should receive a deputation from the Town Council to reiterate their submission that the demolition of all the houses in the area was the only effective method of dealing with the area.

Mr. Kerwood on January 10, 1934, replied on behalf of the Minister and said: "I think it will be better to write to you semi-officially in reply to your letter of January 3. In view of the quasi-judicial function which the Minister has to exercise there would be considerable difficulty in the way of receiving a formal deputation representing one side only," and he asked what was the result of the negotiations between the owners and the corporation officials with regard to reconditioning.

On January 11 the Town Clerk replied that "when the officials reported to the Council the result of the interview in London, the Council would not permit them to proceed on the lines suggested, the Council still being of opinion that the only satisfactory way of dealing with the property was by its inclusion in a clearance area."

On January 17, 1934, Mr. Kerwood wrote back stating that Mr. Francis, the Principal Assistant Secretary in charge of Housing, had arranged to visit with Mr. Collin and himself various towns in the North of England and proposed to visit Jarrow on January 23, and added " it would I think be of advantage if you could arrange for the members of the Council and the officers who were to form the proposed deputation to this office to meet us there and discuss the matter."

On January 23, 1934, the officials from the Ministry visited Jarrow and inspected the area in question in company with the Corporation officials—no representatives of the owners being present.

On February 24, 1934, the Town Clerk wrote to Mr. Kerwood saying that " The Council . . . . resolved to adhere to the Order and to request its confirmation," and after setting out the four grounds on which the council reiterated their request for the confirmation of the Order, the letter went on to state that " the Council are advised by the Engineer that it is not practicable, even if it were right to do so, to deal with the houses individually by way of closing order, as to reconstruct the houses would require the total vacation of the houses by the inhabitants. In any event this does not arise as the Engineer advises that the foundations and structure of the houses, generally speaking, preclude the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation." The Borough Engineer had not been called as a witness at the public inquiry and those who represented the owners had not had the opportunity of cross-examining him.

On February 24, 1934, the Town Clerk wrote in answer to the request of the Minister that the Council should review their five year slum clearance programme in the light of their financial resources, and said: " The Council have decided to accede to this request before they take any further steps under the five year programme, and they instructed me to sign the undertaking on their behalf."

On March 10, 1934, Mr. Kerwood wrote to the Town Clerk, saying: "I am directed by the Minister of Health to refer to your further letter of the 24th ultimo relative to the North Ward No. 1 Clearance Order which formed the subject of a local inquiry on May 31 and June 1, 1933, and to state that in all the circumstances he has decided to confirm the order."

The clearance order was confirmed by the Minister of Health on March 27, 1934, and duly published.

On May 17, 1934, the appellants gave notice of their intention to move the High Court, under s. 11 of the Housing Act, 1930, for an order that the Clearance Order as confirmed by the Minister of Health should be quashed on the ground that the order was not within the powers of the Housing Acts, 1925 and 1930, or alternatively that the requirements of the Housing Act, 1930, had not been complied with and the interests of the appellants had been thereby substantially prejudiced, in that, between the date of the holding of the public inquiry and the confirmation of the order the Minister and the Council, by their representatives, met and discussed together the condition of the houses in the area and whether the order should be confirmed, made an inspection of the houses in the area, and held communications in writing discussing the said matters without giving any notice to the appellants of the said meetings, discussions or inspection, or any opportunity to attend thereat, or to see the written communications or to reply thereto. Further, that the Housing Act, 1930, impliedly required that the objections of the appellants should be fairly and properly considered by the Minister and that the Minister should give fair and proper effect to the result of such consideration in deciding whether the order should be confirmed, and that such implied requirements were not complied with.

SWIFT J. held that the Minister of Health when acting under the Housing Act, 1930, was not acting as a judge deciding an issue between two parties, but was acting as an administrative officer having to perform a statutory duty

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imposed upon him by the legislature for the benefit of the community, and that so long as he complied with all the requirements which the legislature had laid down to govern his conduct when there were objections—namely, by holding a public inquiry and by considering the objections and the report of the person who held the inquiry, he might inform his mind in any way that he liked and arrive at his decision in any way which seemed good to him. When the Minister had proceeded to confirm a clearance order it was impossible to say that the order which he made was not within the powers of the Act, or that any requirement of the Act had not been complied with. The application must therefore be dismissed.

The owners of the property comprised within the area appealed.

Blanco White and *J. Charlesworth* for the appellants. In dealing with a clearance order under the Housing Act, 1930, the Minister of Health occupies a quasi-judicial position and is not a mere administrative officer. It follows, therefore, that if he fails to consider and deal with the matter as a quasi-judicial officer should, the Court has power, and ought, to quash his order. The question turns mainly on para. 4 of Sch. I. to the Act which says that " if no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification ; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification . . . . " Those words obviously point to a careful and quasi-judicial consideration of all the circumstances, including any objections made by the house owners affected, which have not been withdrawn ; and it is clearly an infraction of this rule if after one side has been heard the other side is given no opportunity of answering. Prohibition and certiorari have been held to lie to the Minister :

see *Rex* v. *Minister of Health, Ex parte Davis* (1), and *Minister of Health* v. *The King* (2), and neither of those writs will lie except to a person exercising judicial or quasi-judicial functions. Those decisions were, it is true, given on the Housing Act, 1925, but there is no essential difference between the position of the Minister under that Act and his position under the Housing Act, 1930, so far as his duty to owners is concerned. The position and duty of the Minister in such cases was clearly enunciated by Lord Loreburn L.C. in *Board of Education* v. *Rice* (3) where he said (4): " Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law . . . . but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view . . . . The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari." Again, in *Local Government Board* v. *Arlidge* (5), Viscount Haldane L.C. said (6): " When the duty of deciding an appeal is imposed, those whose duty

(1) [1929] 1 K. B. 619.
(2) [1931] A. C. 494.
(3) [1911] A. C. 179.
(4) [1911] A. C. 182.
(5) [1915] A. C. 120.
(6) Ibid. 132.

it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice." See further *Rex* v. *Housing Appeal Tribunal.* (1) What the Minister did in the present case failed to satisfy the obligations imposed upon him as stated in those decisions.

Sir Donald Somervell S.-G. and *W. Bowstead* for the Minister of Health. When the Minister confirms a clearance order made by a local authority he is acting in an administrative capacity, and his confirmation does not cease to be an administrative act merely because objections are made to the confirmation of the order. Under the Housing of the Working Classes Act, 1890, s. 35, a person aggrieved by a closing order might appeal to quarter sessions. Under s. 17 of the Housing, Town Planning, etc., Act, 1909, an appeal was given to the Local Government Board. In the Housing Act, 1925, the right of appeal was taken away, but a right of petition to the Minister of Health was given by s. 40. In the Housing Act of 1930 the language of the Act is altered and the confirmation of a closing order ceases to be a judicial act and becomes purely an administrative act. The Minister has to find out the facts for himself and is not confined to the facts put before him by evidence. The relations between the Minister and a local authority are those between a superior and a subordinate administrative body. The local authority do not act as the slum clearing authority with an appeal against their decisions to the Minister. The Minister and the local authority together form the slum clearing authority and they work in unison. It would be very curious if the Minister and the local authority could not communicate with each other without informing the owners of the property affected. When objections are made to a clearance order which are not withdrawn the Minister is bound by the Act to cause a public

(1) [1920] 3 K. B. 334.

local inquiry to be held, but the Minister is not thereby precluded from obtaining information from any other sources that are open to him. In the present case the objectors called no evidence at the public inquiry with regard to the financial resources of the local authority, and the Minister had therefore to consider the question as to the financial resources of the local authority without any assistance from evidence brought before him by the objectors, and the objectors cannot now complain that the matter was dealt with in communications between the Minister and the local authority. There is no duty upon the Minister to communicate to the owners of the property affected the contentions and information put before him by the local authority subsequent to the public inquiry. The question as to the best method of dealing with the houses is one of policy, and the local authority were continually reiterating their views on this question of policy adhering to their wish that the Minister should confirm their clearance order.

[GREER L.J. referred to the letter of the Town Clerk of February 24, conveying the opinion of the borough engineer that the houses could not be reconditioned on account of their defective foundations, the borough engineer not having been called as a witness at the public local inquiry.]

There is no evidence that that opinion in any way affected the decision of the Minister to confirm the clearance order which proceeded entirely upon a consideration of the financial resources of the local authority. The Minister complied with all the requirements of the Act of 1930 with regard to the holding of a public local inquiry and considering any objections not withdrawn and the report of the person who held the inquiry: he was therefore entitled to confirm the order. The cases that have been cited are very different cases from the present. They deal with the procedure to be adopted by authorities whose functions are administrative and not in the ordinary sense judicial. None of the cases fetter the right of administrative officers to settle their own procedure. Lord Moulton in *Local Government Board* v. *Arlidge* (1) said: " I do

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(1) [1915] A. C. 120, 149.

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not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a department of State as the Local Government Board under statutory powers such as we have here to deal with." In that case there was a right of appeal, whereas in the present case there is no right of appeal; the objectors must state their objections at the local inquiry but there is no lis between parties. Atkin L.J. in *Rex* v. *Electricity Commissioners* said (1) that "certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed." Therefore certiorari implies a judicial procedure. "Quasi-judicial procedure" is a very vague phrase.

Blanco White in reply. The duties of a person holding a quasi-judicial position are defined in *Board of Education* v. *Rice* (2) and in *Local Government Board* v. *Arlidge.* (3) A Government department in that position must act fairly. An award of an arbitrator was set aside in *Gregson* v. *Armstrong* (4) on the ground that it was improper for an arbitrator to take information from one side in the absence of the other.

[He was stopped.]

GREER L.J. This is an appeal from a decision of Swift J. given under s. 11 of the Housing Act, 1930, refusing to quash an Order of the Minister of Health confirming a clearance order which was made by the Corporation of Jarrow.

The order is concerned with certain buildings in what is called No. 1 Area, which are referred to on the plan, document No. 13, with which we have been provided. The appellants are concerned with properties which have on that plan been enclosed with a red line.

The powers of the Minister are contained in the Act and the First Schedule to the Act (5) and under those powers he could, if no objection be taken on behalf of the persons interested in

(1) [1924] 1 K. B. 171, 204.
(2) [1911] A. C. 179.
(3) [1915] A. C. 120.
(4) (1894) 70 L. T. 106.
(5) See note p. 283 post.

the property, make an Order confirming the order made by the local authority; and in so far as the Minister deals with the matter of the confirmation of a closing order in the absence of objection by the owners it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such inquiries as he thought necessary to enable him to make up his mind whether it was in the public interest that the Order should be made. But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. It seems to me that in deciding whether a closing order should be made in spite of the objections which have been raised by the owners the Minister should be regarded as exercising quasi-judicial functions. The effect of the closing order if confirmed would be to diminish greatly the value of the property owned by the objecting parties, and the decision of the Minister is a decision relating to the rights of the objecting parties and, in my view, it is a decision in respect of which he is exercising quasi-judicial functions. I will deal with the decisions and the law on the question after shortly stating the facts.

On February 23, 1933, the clearance order was made by the Council. On April 13 notice was published in accordance with the provisions of the Act, and on April 26, 1933, objections were made by the owners of the property concerned in this appeal. The notice of objection was as follows: " We hereby give notice that our clients object to the above mentioned clearance order made by the Mayor Aldermen and Burgesses of Jarrow on the 23rd day of February, 1933, on the following grounds: (1.) The dwelling-houses in the area are in good repair and sanitary condition and fit for human habitation." Then follow Nos. 2 and 3, with which we are not concerned. " (4.) The expense to the local authority if the order is confirmed will be more than the town can bear at the present time. (5.) The local authority cannot provide or secure the provision of accommodation for the persons of the working classes who will be displaced by the clearance of the area within the time specified in the order for the premises to be vacated, nor does such accommodation already exist. (6.) In any event the demolition of all the buildings in the area is not the most satisfactory method of dealing with conditions in the area."

So far as they presented their objections at the public hearing by the Inspector appointed by the Minister, the appellants relied mainly upon No. 1 and No. 6; but No. 4 and No. 5 were never withdrawn, and they were therefore matters that had to be considered by the Minister before he made his final decision.

During the course of the inquiry, a suggestion was made that the situation was one which might be adequately met by an agreement between the Medical Officer of Health of the Council and the owners of these workmen's cottages as to what repairs would be required in order to make the buildings reasonably fit for habitation. But the Inspector quite properly said that even if such an agreement were made he could not bind the Minister to it. That was quite a correct attitude for him to take up. Thereafter the inquiry was concluded, and negotiations took place between the Medical Officer and the owners of these buildings in order to arrive at some decision as to what repairs the owners would undertake to do in order to meet the objections of the Medical Officer, and ultimately I think it is clear upon the evidence a consensus of view was established between the Medical Officer and the owners as to what repairs would be required to make the buildings properly habitable for a substantial number of years. But again I accept the view which has been put forward on behalf of the Minister that he was not bound to give effect to the arrangement that had been made.

On September 6, 1933, in order to enable the Minister to give his decision on the question as to what effect, if any, should be given to the objections which had been urged at the public inquiry, there was a meeting at Jarrow and, quite properly, the people who were summoned to that meeting included representatives of the owners as well as representatives of the Corporation. So far, it is not possible to take any objection to the action of the Minister or those who represented him at the Ministry in London. But it was still the view of those concerned that the matter might be met by an agreement between the Council, on the one hand, and the owners on the other, though that was not a view that commended itself to the Council. It seems, however, to have been considered by those who represented the Minister that the matter might still be disposed of in that way. The negotiations continued, but notwithstanding that, the Council maintained their view that the only right way of dealing with the situation was to have their clearance order confirmed, and they passed resolutions to that effect and communicated those resolutions to the Minister in London. So far as my view of this case goes I am satisfied that there was nothing wrong in the Minister receiving those communications from the Council. It was a matter on which the Council were entitled to stress the view that was already implied in the clearance order that they had made in the first instance, but I think it would have been a wise precaution on the part of the Minister when he received those further communications from the Council pressing for the confirmation of the order to communicate those letters or verbal persuasions to the other side, the objectors, and ask whether they had anything further to say on the matter. Still, I doubt very much whether, if the position had remained there, any real objection could be taken to the conduct of the Minister in confirming the order. But it did not rest there, because there were numerous communications between, first of all, the acting Town Clerk, and subsequently the appointed Town Clerk of the Council, and the Minister, and those communications afforded to the Minister additional evidence on which he was asked by the Council to confirm the order they had made. Various letters from the Medical Officer to the Council were sent by the Council to the Minister expressing the further opinions of the Medical Officer. One of them, dated October 13, 1933, is in these terms: "With regard to the area generally, I feel that in view of the low standard of workmanship (vide evidence of Mr. Lumsden at the inquiry) and low quality of the materials used in the construction of these houses it is unlikely that any repairs will render the houses fit for a reasonable length of time." That was one of the matters

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which had been discussed at the inquiry, and this is an instance of the Council sending to the Minister a further opinion of one of their witnesses who had been present at the inquiry, without the objectors having any opportunity of dealing with that further opinion. So much with regard to Dr. Dormer's opinion. There is more than one letter which was sent to the Minister in the same way and to a similar effect. The objections to what was done do not, however, rest there because, at a later date, Mr. Kerwood, on behalf of the Minister, wrote on November 8, 1933, to the Town Clerk, saying: "I think that it would be of advantage if you and the Medical Officer of Health and the Surveyor could call and discuss with us here how the proposals of the owners might be carried out and subsidy under the Act of 1930 be made available in respect of the rehousing accommodation required. Would you let me know when it would be convenient for you to come." There is nothing very objectionable about that, but it is noticeable that at this time the Ministry were still considering whether the situation could not be met by repairs rather than by the demolition of the area.

The correspondence went on, and on January 3, 1934, the Town Clerk wrote asking that the Minister should receive a deputation from the town council to reiterate their submission that the demolition of all the houses in the area was the only effective method of dealing with the area. Mr. Kerwood, on behalf of the Minister, replied on January 10, 1934, in a very proper letter. He said: "I think it will be better to write to you semi-officially in reply to your letter of the 3rd January. In view of the quasi-judicial function which the Minister has to exercise there would be considerable difficulty in the way of receiving a formal deputation representing one side only. Before considering the matter further, however, I should be grateful if you would let me know what has been the result of the negotiations with the owners which it was agreed with the deputy Town Clerk, the Medical Officer of Health and the Borough Engineer at the interview at this office should be carried on." That again is a very proper letter written by Mr. Kerwood in which he recognized, though that does not bind this Court, that the duty of the Minister was of a quasi-judicial character, and it would therefore be wrong for the Minister to receive a deputation from the Council in the absence of the objectors. But apparently the view that he expressed did not continue to be the view of the Ministry. It may have continued, so far as I know, to be Mr. Kerwood's view, but it was not the view upon which the Ministry acted. Accordingly on January 17, 1934, he wrote this letter: " It so happens that Mr. Francis who, as you are no doubt aware, is the Principal Assistant Secretary in charge of Housing, has arranged to visit with Mr. Collin "—Mr. Collin being the Inspector who held the inquiry—" and myself various towns in the North of England next week "—probably Mr. Collin had also held inquiries as regards the other towns which were included in the term " various towns in the North of England "—" We could spend at Jarrow the afternoon and early evening of Tuesday, 23rd January, and it would I think be of advantage if you could arrange for the members of the Council and the officers who were to form the proposed deputation to this office to meet us then and discuss the matter." Mr. Kerwood is there suggesting, contrary to what he had suggested in the earlier letter, that it would be quite right for the members of the Council and the officers to meet the Principal Assistant Secretary in charge of Housing at Jarrow, though it might still be improper for them to meet in London. It seems to me that if it was improper for them to meet in London, it was equally improper for them to meet in Jarrow in the absence of the representatives of the owners of the property in Jarrow, whom they could easily have obtained.

That interview so arranged did in fact take place and what happened is a little vague. No doubt questions of finance were discussed, though it is a little odd, as was pointed out by Mr. Blanco White, that if the financial question was the main question to be discussed, the Borough Treasurer was not one of the officials who were asked to be present upon this occasion; but undoubtedly the Principal Assistant Secretary with Mr. Collin, the gentleman who had held the inquiry, and three officials of the Corporation visited the site and had the

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opportunity of having pointed out to them by the officials of the Corporation in what respect the buildings were such as would make it unsatisfactory to leave them even in the condition they would be in if the repairs and alterations which had been suggested were agreed to and carried out.

Now it seems to me that if, as I think, the Ministry were acting in a quasi-judicial capacity they were doing what a semi-judicial body cannot do, namely, hearing evidence from one side in the absence of the other side, and viewing the property and forming their own views about the property without giving the owners of the property the opportunity of arguing that the views which the Ministry were inclined to take were such as could be readily dealt with by means of repairs and alterations to the buildings. Whether the surveyor was one of the officials, or whether the borough engineer was one of the officials, we do not know; but we do know this, that by a letter of February 24, 1934, which was sent by the Town Clerk to the Ministry of Health, the views of the borough engineer were put before the Minister before the Minister gave his decision. The borough engineer had not been called at the public inquiry. Those who represented the owners had not had the opportunity of cross-examining him, testing the value of his opinion, and representing to the Minister through the Inspector that no weight should be attached to his view. The view of the borough engineer is expressed in the letter from the Town Clerk to the Ministry on February 24, 1934: "In any event this does not arise as the Engineer advises that the foundations and structure of the houses, generally speaking, precludes the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation." That is a view which is hardly consistent with the view which had been expressed on behalf of the Borough Council by the barrister who appeared for them at the inquiry. It is an additional reason being urged by the Council on the advice of the borough engineer in order to put pressure upon the Ministry to confirm the order which had been made by them.

Now I think it quite clear on the authorities that if this were a case not affected by the special legislation contained in s. 11 of the Act of 1930, certiorari would have been granted to quash the confirming Order. I take that to be the law as laid down by Viscount Haldane L.C. and Lord Parmoor in *Local Government Board* v. *Arlidge*. (1) Viscount Haldane there said (2): "It is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from Courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported. My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work

(1) [1915] A. C. 120. (2) Ibid. 132.

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efficiently." Both Lord Haldane (1) and Lord Parmoor (2) cited with approval the views which had been expressed by Lord Loreburn L.C. in *Board of Education* v. *Rice* (3), where he said: "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. . . . . The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari." There are also passages in the judgments of Bankes L.J. and Atkin L.J. in *Rex* v. *Electricity Commissioners* (4) giving the history of the extension of the powers of the Court in interfering by certiorari, not merely with inferior courts, but also with individuals who are given quasi-judicial functions. I think these observations are specially applicable to this case, where the quasi-judicial function was of a

(1) [1915] A. C. 133.
(2) Ibid. 141.
(3) [1911] A. C. 179, 182.
(4) [1924] 1 K. B. 171, 195, 204.

character to deprive the appellants of important rights that they held as citizens. It is said that that cannot be done by reason of the Act of 1930, which contains special provisions as to what the judge may consider. Sect. 11 of the Act says this, sub-s. 1: "The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation." Sub-s. 2: "So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form," and so on. Then sub-s. 3: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court—(i.) may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings; and (ii.) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." It is said by Mr. Blanco White on behalf of the appellants that the Court ought to be satisfied that the Order is not within the powers of this Act or, alternatively, that the interests of the applicants had been substantially prejudiced by a requirement of the Act not having been complied with.

In order to see what the requirements of the Act are one must look to the First Schedule to the Act. Para. 4 of the Schedule says: "If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification." That part of the paragraph does not apply, because the objections were not withdrawn. The paragraph goes on: "but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification." It seems to me that that involves the proposition that the matters there mentioned are the only matters which he is entitled to consider, and that if, instead of directing his mind solely to those matters, he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given ex parte afterwards without the owners having any opportunity whatever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the Act. It is admitted that though the draftsmanship of s. 11, sub-s. 3, is not perfect, the Order there referred to is the confirming Order and not the original order. In my judgment it is true to say that an order made by a quasi-judicial officer based on materials which are not the materials referred to in para. 4 of the First Schedule is an order which is not within the powers of the Act, having regard to the proposition which has been established in common law that a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice, that is to say, he must hear both sides and must not hear one side in the absence of the other.

For these reasons I have come to the conclusion, though the point is not free from difficulty, that we ought to reverse the order that has been made by the learned judge and quash the confirming Order made by the Minister of Health.

MAUGHAM L.J. I am of the same opinion. The important question that arises upon this appeal is one of law as to the position of the Minister of Health in confirming an order establishing a clearance area under the Housing Act of 1930. The Act by s. 1 (1) gives the local authority power to declare an unhealthy area to be a clearance area, but the order is not

(1) See note p. 283 post.

binding upon any one until it has been confirmed by the Minister of Health.

The local authority have to be satisfied, as the Solicitor-General pointed out in his argument, on four topics. The first one is a pure question of fact, whether the dwelling-houses in the area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of other circumstances mentioned in the section dangerous or injurious to the health of the inhabitants of the area. The second thing is, that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, and there I may mention that the usual alternative is that of reconditioning the houses in the area. It is to be noted in connection with those two qualifications that the authority in defining the area on a map have to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health, so that if there were in the area some buildings which at small expense could be rendered perfectly proper they would, I think, prima facie have to be excluded from the area. The third qualification is that suitable accommodation is available for the persons displaced by the clearance, and the fourth is, that the resources of the authority are sufficient for the purpose of carrying the resolution into effect.

It is apparent that those are four very widely different qualifications. The first is a pure question of fact. The second, with regard to the most satisfactory method of dealing with the conditions in the area, is, as I think, a question of fact, in this sense that it does not involve any question of law; it is a matter for the discretion of the person who has to satisfy himself upon the matter, and depends upon weighing the relative advantages and disadvantages of dealing with the area in the way of demolition, or dealing with it by the alternative method of re-conditioning the houses in the area. I may add, however, that the second qualification, being very largely one of discretion, it is naturally one with regard to which different persons would form very different views, because if the first qualification that the houses are unfit for human habitation has been proved, it may well be that the person deciding upon the most satisfactory method of dealing with the conditions in the area may be entitled to take the view that no reconstruction will make the area one in which there are truly satisfactory houses or buildings. Those are the main provisions of s. 1. Sect. 2 provides for the resolution or the order being submitted to the Minister for confirmation by him, and that brings in under sub-s. 2 the provisions of the First Schedule to the Act. I need not read the whole of them, but the fourth of the provisions in the First Schedule is very important, and I shall have to refer to it again.

The main question of law is as to the position which the Minister occupies when, under para. 4 of the First Schedule, he causes a public local inquiry to be held, and proceeds to consider any objection made to the clearance order and either to confirm the order with or without modification, or to reject it. Are his acts in that respect merely acts of administration in reference to which the only remedy of the subject, if his powers are improperly exercised, is an application to Parliament, or is he exercising a quasi-judicial function, a function I may observe of a somewhat vague character? As I do not like using words the meaning of which I do not know, I will say at once that I use the phrase "quasi-judicial" in the sense in which it has been used in some of the decisions, and in particular having regard to the qualification upon its meaning which I think is to be found in the decision of the House of Lords in *Board of Education* v. *Rice*. (1) The Minister is not, in my opinion, in the position of a judge, and he has not to hold a judicial proceeding. What he has to do is to ascertain the law, so far as the law is material, and the facts; and, in my view, he is in the same position as the Board of Education was in the case of *Board of Education* v. *Rice*. (1) Lord Loreburn L.C. (2) remarks as follows, and I may say that his statement has constantly been approved by other judges: "I need not add that in doing either"—that is in ascertaining the law and ascertaining the facts—"they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." I repeat that is the sense in which I use the phrase "quasi-judicial." I may add that in the *Arlidge* case (1) that statement was in effect approved by various lords.

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(1) [1911] A. C. 179. (2) Ibid. 182.

In determining whether the position of the Minister is that which I have described as being quasi-judicial, I think it is necessary to appreciate that under a clearance area scheme to which objections are made by the owners of the property in the area, there is a true contest as between the owners of the property and the local authority; in other words, there are two sides as between whom the Minister has to come to a determination after consideration. It also has to be borne in mind that the rights of the householders are being very seriously affected by an Order that their houses shall be demolished without compensation. That, of course, must not be pressed too far, but it is a consideration which cannot be neglected.

Under para. 4 of the First Schedule—I deal only with the cases where there are objections, because the others are cases where, in effect, nobody complains—if there are objections the Minister is required—the word "shall" is used—before confirming the order, to cause a public local inquiry to be held. Then the paragraph goes on, "and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification." It has been suggested that the main object, not the only object of the public inquiry, is to afford publicity in the local press which may in some way affect the decision of the Minister. That is not, in my view, by any means the only reason for requiring a public local inquiry to be held. The obvious implication is, that at such

(1) [1915] A. C. 120.

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an inquiry the two sides may be heard. Persons will be called before the gentleman who holds the inquiry who will make statements which may perhaps, without much inaccuracy, be described as their evidence, and it is obvious, I think, that the side which objects to any statements made by any such witnesses must be entitled to ask questions, which may be described as cross-examination. The Solicitor-General does not seek to object to the view that that public inquiry is of the nature of a quasi-judicial inquiry in which, although the rules of procedure of a Court of Justice may not be followed, the ordinary principles of fair play have to be observed. As I think, the question whether the Minister, after such an inquiry has been held and after a report has been made, can then proceed—I am not dealing with the facts for the moment—to hear ex parte statements from one side or the other in the absence of those whose obvious desire it would be to controvert them is precisely similar to the question whether, after holding a public local inquiry or after having caused a public local inquiry to be held of a quasi-judicial character, the Minister can then hold a private inquiry of his own to which one party only is admitted. That seems to me to be a very extraordinary result, and one which I should be very slow to approve, especially in such a case as the one I am dealing with—namely, a case in which the rights of property owners are being affected without compensation; nor do I think the form of para. 4 of the First Schedule tends to suggest anything of the sort. It has already been pointed out that the form is: After causing the inquiry to be held, considering any objection not withdrawn and the report, the Minister may then confirm the order either with or without modification. In my opinion, had it been intended by the legislature to authorise the Minister after having caused a public inquiry to be held and after having received the report, then to hold a private inquiry of his own—with regard to something which was the subject of an objection which was being considered before the Inspector, I should have expected the legislature to say so in plain terms. My conclusion is, that on the fair construction of this clause he has no right to do anything of the kind. That is not to say that there may not be matters which were not in dispute at all at the inquiry, and which were not the subject of anything dealt with at the inquiry, with regard to which he might, if he thought fit, inform himself. I am dealing with a case where something which is the subject of an objection definitely put and urged before the gentleman who holds a public inquiry is before the Minister after the report has been made, and with regard to which he subsequently obtains ex parte information from one side or the other. My conclusion is that although the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the *Board of Education* v. *Rice.* (1)

Now I want to deal to some extent with the facts, endeavouring to avoid re-stating all that has been said by my Brother Greer. It is not immaterial to note that, as the result of the public inquiry, those who were representing the local authority came to the conclusion, which, of course, did not bind those for whom they were acting, that reconditioning of the houses in this area was a practical course, and that would, of course, involve the condemnation of the scheme. We have not seen the report which was made because, acting on a legal authority, the Ministry has thought fit, and very likely for a good reason, not to put it in evidence. But it is I think apparent that on November 17, 1933, when the officials of the local authority attended at the Ministry in London and were received by Mr. Kerwood, who had Mr. Collin, who held the inquiry, in attendance, Mr. Kerwood's statement was very far from a statement to the effect that the Ministry were satisfied that the most satisfactory method of dealing with the conditions in the area was the demolition of these buildings. So far from that being so, Mr. Kerwood said that the Ministry had very carefully considered the Council's proposals, and then this follows, according to the report of the acting Town Clerk, which was made almost immediately after the meeting of November 17: "They are of opinion"—that is, the officials

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(1) [1911] A. C. 179.

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of the Ministry—" that whilst the houses in their present condition are not suitable for habitation, it is not impossible to make the most of them fit for another 15 or 20 years. To do this, very substantial repairs, and in some cases reconstruction, will be necessary." There are further paragraphs which deal with the difficulty about reconditioning, and the report then continues: " It is suggested that the Borough Engineer and Medical Officer of Health collaborate to decide on the work necessary to be done and draw up a schedule in respect of each house. These schedules are to be submitted by them to the respective owners and the owners are to be asked to give undertakings to carry out all the work specified within a reasonable time and to agree to closing orders being made in respect of parts of the houses." According to the report, the next statement was this: " If the owners will not give undertakings to do reasonable reconditioning, the Minister will confirm the order so far as those properties are concerned," not, be it observed, with regard to the whole of the area, but only with regard to those parts of the area as to which the owners will not give an undertaking. I accept that, coming from the source it did, and having been drawn up at the time, as a fair account of what took place between the officials of the Corporation and the officials of the Ministry.

According to the evidence before us, the Housing Committee of the Town Council, and the Town Council itself, wholly disagreed with the view which had been taken on their behalf at the inquiry, and with the proposals suggested by the Ministry; and they recommended on September 19, 1933, " that the Council's decision that this area should be a clearance area, be again stressed upon the Ministry." At a later date there was a proposal that some of the officials should call upon the Ministry, that being done at the request of the Ministry of Health. On December 19, 1933, there is a minute that the committee had received the report from the officials who visited the Ministry of Health, and having received that report they " recommend that the Minister be asked to receive a deputation consisting of your Chairman and Councillor Symonds to reiterate again your submission that the demolition of all the houses in this area is the only effective method of dealing with the area." That was after the Ministry of Health had once more dealt with the question of reconditioning, without in any way suggesting that reconditioning was not the best way of dealing with the area; and indeed the implication was that at that time they thought it was. I agree that it may well be that the officials of the Ministry at this time were in favour of the course of reconditioning, because they were impressed with the financial position of Jarrow and had at the backs of their minds the question whether the resources of the authority were really sufficient for the purposes of carrying out the clearance order. Therefore I do not want to lay too much stress upon the view, which I think anybody would immediately take on reading the documents to which I have referred—namely, that at this time the Ministry were in favour of reconditioning the houses in the clearance area rather than demolition. It may be that they were in favour of reconditioning only because they thought the resources of the authority were insufficient, but what followed then is the matter which so much exercises my mind in dealing with the facts of this case. On January 3 the Town Clerk wrote to the Ministry of Health—and I am here going to read very short paragraphs—stating that the Council, notwithstanding the recommendations of the Ministry, "are still of the opinion that the only satisfactory way of dealing with the property is by its inclusion in a clearance area, and they submit that the order should be confirmed." Then they asked, in support of those submissions, that the Minister should receive a deputation, consisting of the chairman of the Housing Committee and two councillors together with the appropriate officials. The reply on January 10, 1934, of Mr. Kerwood, on behalf of the Ministry, begins by saying: "I think it will be better to write to you semi-officially in reply to your letter of the 3rd January. In view of the quasi-judicial function which the Minister has to exercise, there would be considerable difficulty in the way of receiving a formal deputation representing one side only." I think he was perfectly right in that view, and it encourages me to think that in deciding that some of the functions of the Minister are, at any rate, quasi-judicial, I am not giving a shock to the officials in the Ministry of Health.

On January 11, 1934, there was a reply from the Town Clerk which was described as a semi-official reply. It contains this paragraph: "When the officials reported to the Council the result of the interview in London,"—which was to the effect that the Ministry were pressing for an agreement between the owners and the borough officials with regard to reconditioning—"the Council would not permit them to proceed on the lines suggested, the Council still being of opinion that the only satisfactory way of dealing with the property was by its inclusion in a clearance area. This took place at the meeting in December, and at that meeting also, the Council resolved to ask the Ministry to receive the deputation mentioned in my previous letter." Upon that Mr. Kerwood wrote back on January 17, 1934, and he noted that "the Council decided that their officers should not proceed on the lines agreed at the recent interview at this office." I think there is some importance to be attached to the word "agreed." The letter continues: "It so happens that Mr. Francis who, as you are no doubt aware, is the Principal Assistant Secretary in charge of Housing, has arranged to visit with Mr. Collin and myself various towns in the North of England next week. We could spend at Jarrow the afternoon and early evening of Tuesday, 23rd January, and it would I think be of advantage if you could arrange for the members of the Council and the officers who were to form the proposed deputation to this office to meet us then and discuss the matter." That is in a letter headed: "North Ward No. 1 Clearance Order, 1933." I think that was an error of judgment. I think the right course, having regard to the view I take, and which Mr. Kerwood himself had taken, who had pointed out that the functions of the Minister in this respect were quasi-judicial, was to suggest that in addition to those people, one or two representatives of the other side should also be present. However, that was not done, and on January 23, 1934, this ex parte perambulation of the district took place, followed as it was by a meeting at the Town Hall, at which further suggestions were made with regard to the main point—namely, the question whether reconditioning was a course which might not be better than demolition.

On February 24, 1934, the matter being still not yet decided by the Minister under his powers, the Town Clerk wrote to Mr. Kerwood a letter in which he says: "The Council . . . . resolved to adhere to the order and to request its confirmation; at the same time, to meet the wishes of the Minister, they resolved to give their undertaking to review the five year slum clearance programme in the light of their financial resources." Then: "The grounds on which the Council reiterate their request for the confirmation of the order are as follows," and there follow the four qualifications which I mentioned as qualifications in s. 1 of the Housing Act, 1930. Then there follow this paragraph: "In connection with reasons (1.) and (2.)"—(2.) being the question whether demolition or reconstruction was the best plan—"the Council are advised by the engineer that it is not practicable, even if it were right to do so, to deal with the houses individually by way of closing order, as to reconstruct the houses would require the total vacation of the houses by the inhabitants." I should imagine, in the absence of evidence, that that is a thing upon which opinions might differ. The letter continues: "In any event this does not arise as the engineer advises that the foundations and structure of the houses, generally speaking, precludes the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation." That is an entirely fresh point, a matter that had never been raised on the public inquiry. The engineer is said—I agree it is hearsay—to have formed that opinion, and instead of the Ministry writing back and deprecating matters of that sort being stated to them without the presence of the other side and without any opportunity for the other side to cross-examine to such a statement, or to call evidence on the other side, one gets the final letter from Mr. Kerwood, on March 10, 1934, saying: "I am directed by the Minister of Health to refer to your further letter of the 24th ultimo relative to the North Ward No. 1 Clearance Order which formed the subject of a local inquiry on the 31st May and 1st June, 1933, and to state that in all the circumstances he has decided to confirm the order." On that it seems to me difficult for us to come to the conclusion that the Minister, who refers to all the circumstances, and indeed, to some extent having invited these expressions of opinion by officials of the Corporation, was totally uninfluenced by anything which took place ex parte. I ought to add that in referring to the Minister I am more directly referring to Mr. Kerwood, because it is plain that so far as any evidence before us is concerned, the Minister himself never heard of this case or, at any rate, he had nothing to do with the decision, which was left naturally enough to his officials. In my judgment, as I have already said, the officials committed an error of judgment in allowing the results of the public inquiry to be supplemented by a quasi private inquiry, plus ex parte statements made to the Minister, without any repudiation of that being the right course. My view is founded on the fact that the statements I have referred to were statements in reference to the main question which was dealt with at the public inquiry—namely, that of demolition or reconditioning.

Having formed that conclusion, I think it would follow, subject to an argument which was based on s. 11 of the Housing Act, 1930, that prima facie the Order of the Minister ought not to be allowed to stand. Sect. 11 provides a substitute for proceedings by prohibition or certiorari which were in vogue with reference to acts of the Minister of Health under the preceding Act of 1925. It says: "(1.) The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation. (2.) So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed." Then sub-s. 3 provides: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court . . . . (ii.) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." It has been argued before us that even assuming—of course, it is not admitted—that the functions of the Minister are quasi-judicial if he complies with the exact words of para. 4 of the First Schedule and causes a public local inquiry to be held, and considers any objection not withdrawn, and the report of the person who held the inquiry, he has done all that is necessary, and that no objection can be taken under s. 11 on the ground that the requirements of the Act have not been complied with. For the reasons which I have to some extent already indicated, I do not take that view. I think it is not a compliance with para. 4 of the First Schedule to come to a conclusion in favour of confirming the order, basing the conclusion not merely on the public local inquiry and the report of the person who held the inquiry but also on an ex parte private inquiry, such as I think the officials of the Minister have held here. I think that is not a compliance with what is requisite under para. 4 of the First Schedule.

The only question that remains is whether the Court should come to the conclusion that the interests of the applicants have been substantially prejudiced by what has been done, because the quashing of the Order is, of course, a matter of discretion of the Court. I do not think it has been proved that the statements which were made to the Ministry in fact affected the decision of the Minister, or of his officials, and I certainly have no reason to doubt that the officials were acting in what they thought to be the public interest. On the other hand, it seems to me a matter of the highest possible

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importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that ex parte statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and if I am right in the view that I have expressed as to the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I understand them to be, the Court has no option but to quash the Order, as my brother has suggested.

ROCHE L.J. I agree that this appeal should be allowed, and for the reasons assigned by the Lords Justices who have given judgment. There is little that I desire to add, and that little I add out of respect to Swift J., from whose judgment we are differing.

Speaking for myself, I feel that I am differing from the learned judge not upon any question of principle, or upon any question of the construction of the statute. I am differing as to a matter of fact, and that not a matter of fact depending upon oral evidence, or the credibility of witnesses, but depending upon the proper inference to be drawn from documents which are beyond dispute.

As to the principles applicable I have nothing to add to the citations made by the Lords Justices from the decisions of the highest tribunal which has laid down those principles. It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a Court or by a Board, or any body of persons, it is necessary and essential in the words of Lord Loreburn in

Board of Education v. *Rice* (1), which have already been cited, that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard.

The learned Solicitor-General, in answer to a question, which, I think, I put to him, said he did not dispute that the functions of the Minister and those who represented him, in respect of the public inquiry, were quasi-judicial. The argument of the learned Solicitor-General upon the facts was, in substance, to the effect that that which was done by the Minister after the inquiry, and which is complained of, had reference to matters of high policy and to finance, which were not the subject of the inquiry, rather than to matters which were the subject of the inquiry. If I thought that that was the state of facts, I should agree with the conclusion to which it is sought to lead us, but it is, in my judgment, plain on the facts of the case that the situation was otherwise. It is unnecessary to refer again to the letters which have been read, but it is sufficient to say that the Ministry were invited on the subject-matter of this order and this clearance scheme to hear a deputation, and that, quite rightly, those in charge of the matter for the Ministry took the view that having regard to the quasi-judicial position occupied by the Minister, it was not right that a deputation should be heard representing, as it was proposed it should represent, one side only. Unfortunately that view did not continue to prevail, and other advisers of the Ministry permitted themselves to do things which, in my judgment, vitiated the proceedings. They permitted themselves, first, to view the premises, not for themselves or by themselves, but with the representatives of one side only, and without the knowledge of the owners of the property, and without any opportunity to those owners to point out what they thought should be seen there. Secondly, it is clear that they met the same deputation that it was proposed to bring to London with one unimportant

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(1) [1911] A. C. 179, 182.

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alteration of personnel, and to hear the views and arguments of that deputation upon the same matters which had been heard and dealt with at the inquiry. That appears from the minutes of the Council itself. Thirdly, they permitted themselves to receive, without notice to the other side, entirely new evidence which had not been dealt with at the inquiry bearing upon what was the topic of the inquiry, namely, the condition of the houses, and whether it was proper that they should be demolished.

For these reasons I am satisfied, to put the matter shortly, that the inquiry which was required to be in public, and which, according to the admission of the Solicitor-General it is conceded should be such as to give effect to the elementary principle of hearing both sides, was continued and resumed in private, and when so resumed and continued was held with audience to one side alone. That, in my judgment, is manifestly a breach of the requirements of para. 4 of the First Schedule to the Housing Act, 1930. It follows that the remedy prescribed by s. 11 of the Act is open to the appellants, and upon the topic of whether the interests of the appellants were substantially affected by what was done, it seems to me for the reasons assigned by Maugham L.J. that they were so affected, and little if any argument has been presented to the Court to show that they were not so affected.

For these reasons, I agree that this appeal should be allowed, and that the Order should be quashed.

Appeal allowed.
Order of Minister quashed.

Solicitors for appellants: *Francis Miller & Steele, for Livingston & Pattie, Jarrow.*

Solicitor for respondent: *Solicitor to the Ministry of Health.*

R. F. S.

NOTE.

Housing Act, 1930.

"PART I.

"Provisions with respect to the clearance or improvement of unhealthy areas.

"*Clearance Areas.*

Sect. 1, sub-s. 1: "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—

(i) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and

(ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area,

the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained:

Provided that, before passing any such resolution, the authority shall satisfy themselves—

(*a*) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and

(*b*) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect.

Sub-s. 2: "A local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area.

Sub-s. 3: "So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say—

(i) by ordering the demolition of the buildings in the area; or

(ii) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon.

Sect. 2, sub-s. 1: "Where as respects any area declared by them to be a clearance area a local authority determine to order any buildings in the area to be demolished, they shall make and submit to the Minister, for confirmation by him, an order (in this Act referred to as a 'clearance order') ordering the demolition of each of those buildings.

Sub-s. 2: "The provisions of the First Schedule to this Act shall have effect with respect to the making, submission and confirmation of clearance orders."

Sect. 11, sub-s. 1: "The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation.

Sub-s. 2: "So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection.

Sub-s. 3: "If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court—

(i) may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings; and

(ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant.

Sub-s. 4: "Subject to the provisions of the last preceding sub-section, an order shall not, either before or after its confirmation, be questioned by prohibition or certiorari or in any legal proceedings whatsoever, and shall become operative at the expiration of six weeks from the date on which notice of its confirmation is published in accordance with the provisions of sub-section 2 of this section.

Sub-s. 5: " Except by leave of the Court of Appeal, no appeal shall lie to the House of Lords from a decision of the Court of Appeal in proceedings under this section."

" FIRST SCHEDULE.

" *Clearance Orders.*

1. " A clearance order shall be in the prescribed form and shall describe by reference to a map the area to which it applies, and shall fix by reference to the date on which it becomes operative the period, not being less than twenty-eight days from that date, within which the authority require the buildings in the area to be vacated for the purposes of demolition, and for that purpose may fix different periods as respects different buildings.

2. " Before submitting the order to the Minister the local authority shall—

(*a*) publish in one or more newspapers circulating within their district a notice in the prescribed form stating the fact of such an order having been made and describing the area comprised therein and naming a place where a copy of the order and of the map referred to therein may be seen at all reasonable hours; and

(*b*) serve on every owner, lessee and occupier (except tenants for a month or a less period than a month) of any building included in the area to which the order relates and so far as it is reasonably practicable to ascertain such persons, on every mortgagee thereof, a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation, and specifying the time within and the manner in which objections thereto can be made.

3. " So soon as may be after the required notices have been given, the local authority shall submit the order to the Minister for confirmation.

4. " If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification:

" Provided that the order as confirmed by the Minister shall not apply to any building to which the order would not have applied if it had been confirmed without modification.

5. " The Minister may confirm an order notwithstanding that the effect of the modifications made by him in excluding any buildings from the clearance area is to sever that area into two or more separate and distinct areas, and in any such case the provisions of this Act relating to the effect of an order when confirmed and to the proceedings to be taken subsequent to the confirmation thereof shall apply as if those areas formed one clearance area."

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Dec. 20, 21.

FROST AND OTHERS *v.* MINISTER OF HEALTH.

Local Government—Housing—Clearance Area—Area comprised in Order Confirmed by Minister of Health different from that defined in map made at time of resolution of Local Authority—Advice given by Minister as to terms of Order before Objection taken thereto—Validity of Order—Housing Act, 1930 (20 & 21 *Geo.* 5, *c.* 39), *s.* 1 ; *Sch. I.*

By a resolution passed on October 4, 1933, a local authority declared an area within their district to be a clearance area under s. 1, sub-s. 1, of the Housing Act, 1930. The map defining the area included within it certain houses belonging to the local authority. In December certain communications passed between the local authority and the Minister of Health regarding the terms of the clearance order, and on the advice of the Minister the houses belonging to the local authority were excluded from the area. Accordingly, when the clearance order was advertised in March, 1934, it was accompanied by a new map which did not include within the area the houses in question. Objections to the order having been made, an inquiry under Sch. I., para. 4, to the Act was held on May 29, and on September 29 the order was confirmed without modification by the Minister of Health :—

Held, that the fact that the area covered by the order confirmed by the Minister was different from that defined on the map made at the time of the resolution of the local authority did not render the order one which was not within the powers of the Act, although it might be one with regard to which a requirement of the Act had not been complied with.

Held, further, that up to the time of objections to the order being made, the Minister of Health acted in an administrative, and not in a judicial, capacity, and that he was, therefore, entitled, through the officials of his Department, to advise the local authority on what the terms of the clearance order should be.

Errington v. *Minister of Health* (reported p. 249 ante) discussed and applied.

APPLICATION by Frost and others under s. 11, sub-s. 3, of the Housing Act, 1930, for an order quashing a clearance order made by the Birkenhead Corporation and confirmed by the Minister of Health on September 29, 1934.

By a resolution passed on October 4, 1933, by the Birkenhead Corporation confirming a resolution passed on September 19, 1933, by the Health Committee of the corporation, it was declared that an area within the district of the corporation known as the Cambridge Place Area should be a clearance area within s. 1, sub-s. 1, of the Housing Act, 1930. The map defining the area included within the area nine houses which had been acquired by the corporation, not for one of the purposes specified by s. 4 of the Act, but for the purpose of their gas undertaking. A copy of the resolution was duly transmitted to the Minister of Health. On December 5, 1933, the town clerk of Birkenhead visited the Ministry of Health and consulted certain officials of the Ministry with regard to the form which the clearance order should take. On December 9 the town clerk wrote a letter to the Ministry asking the official addressed to peruse a draft of the clearance order which was enclosed and to make observations thereon. On December 23 an official of the Ministry replied in a letter in which he stated that "property belonging to the local authority can only be included in the clearance area if it was acquired for the purposes mentioned in s. 4 of the Act of 1930." It was thereupon decided by the local authority that their houses should be omitted from the area, and the matter proceeded on that basis without any further resolution by the corporation. On March 29 the clearance order was advertised, accompanied by a new map which excluded the houses of the corporation from the area, and notices were served on the property owners affected. Objections were made by the present applicants, who were the owners of nineteen houses affected by the clearance order, and the Minister of Health ordered an inquiry to be held under Sch. I., para. 4, to the Act. The inquiry was held on May 29, 1934, and the applicants contended (inter alia) that the clearance order was bad, inasmuch as it referred to an area different from that referred to in the resolution of the corporation of October 4, 1933. On September 29, 1934, however, the Minister confirmed the order and notice of confirmation was published.

The applicants accordingly applied to the Court for an order quashing the clearance order.

F. E. Pritchard for the applicants. The clearance order is invalid within s. 11, sub-s. 3, of the Housing Act, 1930, as not being within the powers of the Act. The Act prescribes a course of conduct which must be followed if a valid order is to be made. First, the local authority must be satisfied on certain information that the area to be dealt with is unhealthy and that the most satisfactory way of dealing with the conditions in it is the demolition of the buildings. Then they must (*a*) cause the area to be defined on a map; (*b*) after satisfying themselves regarding certain matters, pass a resolution declaring the area to be a clearance area; (*c*) transmit a copy of the resolution to the Minister of Health; and (*d*) take steps to secure the demolition of the buildings (see s. 1). Finally, the local authority must make, advertise, and submit to the Minister, for confirmation by him, a clearance order accompanied by a map describing the area and serve notices on property owners affected (see s. 2 and Sch. I., paras. 1 and 2). The Minister then has to consider the confirmation of the order in accordance with the provisions of para. 4 of Sch. I. In the present case the chain of events laid down by the Act was broken, because the order confirmed by the Minister comprised a different area from that which was originally defined on the map made under s. 1, sub-s. 1. The order had no basis in any resolution of the local authority. The provisions of the Act are, in effect, penal so far as the property owners are concerned and they must, therefore, be construed strictly.

Another ground on which the order is invalid is that the Minister, who must act quasi-judicially in performing his functions under the Act, wrongly intervened by advising the local authority, behind the backs of the applicants, in the interview of December 5 and the letter of December 23. [He referred to *Errington* v. *Minister of Health.* (1)]

Lastly, the advice given by the Minister was wrong, his interpretation of s. 4 of the Act being incorrect.

Sir Donald Somervell S.-G. and *Essenhigh* (*Bowstead* with them) for the Minister of Health. The order was valid. The area defined in the map referred to in the clearance

(1) Ante, p. 249.

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order need not be the same as that made to define the area under s. 1, sub-s. 1, of the Act. There is no necessary connection between the area defined in the original map and that comprised in the clearance order when made. There is nothing in the Housing Act, 1930, to prevent a local authority from altering the area to be cleared between the passing of the resolution by them and the making of the clearance order, and it is eminently reasonable that the local authority should have power to do so. *In re Bowman* (1) shows that an initial mistake in an order or the proceedings relating thereto can be set right by the Minister modifying the order under Sch. I., para. 4, to the Act before he confirms it. That course might have been followed here, and the effect of what was done was the same as if it had been. [*Hall* v. *Potter* (2) was also referred to.]

The Minister did not act improperly. *Errington* v. *Minister of Health* (3) shows clearly that the Minister's functions do not become quasi-judicial until some objection is raised to the order. Here the advice which he gave was given before that time. The applicants did not come on the scene until the local authority had advertised the order and had served notices of it on them. The Act does not intend to hamper the Minister in his ordinary administrative work.

The interpretation placed on s. 4 by the Minister was right.

SWIFT J. [stated the facts and continued :] The right of a person who is aggrieved by the making of a clearance order to appeal to this Court is strictly limited by s. 11, sub-s. 3, of the Act. That section says : " If any person aggrieved by an order desires to question its validity. . . . . " There is no doubt that a person who owns property in a clearance area is aggrieved by the making of an order. His property is demolished with no or very inadequate compensation. For the benefit of the community at large individuals are made to suffer, and their only right of appeal is under s. 11 to question the validity of the order, not to deny justice, nor to urge their own hardship. They can only question the validity

(1) [1932] 2 K. B. 621.
(2) (1869) 34 J. P. 515.
(3) Ante, p. 249.

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of the order on the ground that it is not within the powers of the Act or that some requirement of the Act has not been complied with. On such an appeal the Court may suspend the operation of the order by an interim order—that does not arise in this case—or, if satisfied that the order is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by any requirement of the Act not having been complied with, may quash the order. There is a marked distinction drawn between things done which are not within the powers of the Act and failure to comply with the requirements of the Act. It seems to me to be quite clear that a failure to comply with a requirement of the Act does not prevent what has been done being within the powers of the Act.

In this case one of the complaints was that the order was not within the powers of the Act because there was no resolution of the local authority declaring the particular area concerning which the order was made to be a clearance area, since the resolution passed by the local authority on October 4, 1933, referred to the whole of the houses in Cambridge Place, whereas the area covered by the order was different in that the nine houses belonging to the local authority had been excluded. It was argued that there was no resolution to support or be a foundation for the order which the Minister purported to confirm, as the Act required that there should be. I do not think that that contention is right. In my opinion it is quite competent for the local authority to modify the terms of a resolution which they have passed declaring an area to be a clearance area. It is certainly competent for the Minister to modify it up to the last moment. It does not seem to me that the omission of these nine houses constituted the declaring of a new clearance area which required a further resolution by the local authority. The Act confers powers on the local authority to apply for the confirmation of a clearance order and on the Minister power to confirm it, and, if there is no resolution covering the order which is confirmed, it seems to me that it is not a matter which is outside the powers of the Act but one in which the requirements of the

Act have not been complied with. In other words, mere alteration of the limits of an area after the resolution has been passed by the local authority so as to take out of the clearance area certain property which it is thought should never have been included in it does not render the clearance order, as so amended, outside the powers of the Act, but that, putting it at its highest and most strongly against the local authority, it is merely a non-compliance with the requirements of the Act.

If that view be right, the applicants have to satisfy the Court that their interests have been substantially prejudiced. I fail to see any evidence of such prejudice and, indeed, it was not contended before me that they had been prejudiced. I cannot see that it made the slightest difference to the applicants whether the houses belonging to the local authority were included in the demolition area or not. The first point taken by Mr. Pritchard, therefore, fails.

The next contention was that the Minister improperly intervened in the proceedings, in which it is said he must act in a quasi-judicial capacity, because there was a consultation between the town clerk of Birkenhead and certain of the officials of the Ministry on December 5, 1933, and because, on December 23, 1933, a Ministry official wrote a letter to the town clerk in which it was stated that the property of the local authority ought not to be included in the scheme. It was held by the Court of Appeal in *Errington* v. *Minister of Health* (1) that for certain purposes under this Act the Minister was in a quasi-judicial position, and that all the obligations and duties which rest on a person who occupies such a position rest on him. I have not the slightest desire to question that decision, which I follow loyally, but I am bound to say that I do not understand it. It seems to me that the whole scheme of the Act is against such a view. The Minister may, if he thinks that a local authority is not clearing areas which ought to be cleared sufficiently rapidly or effectively, take the whole matter into his own hands and do it himself. Would he then be acting judicially? He may make an order if there is no objection, and in doing so he may modify or vary the terms of the resolution of the local authority. It seems to me clear that, throughout the Act, he is acting administratively and not judicially.

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(1) Ante, p. 249.

Reliance was placed on *Local Government Board* v. *Arlidge* (1), but that was a very different case from the present. There, by s. 39 of the Housing, Town Planning, &c., Act, 1909, on any appeal under s. 17 of that Act to the Local Government Board the procedure should be such as the Board might by rules determine, and the rules provided that the Board should not dismiss any appeal without first having held a public inquiry. That put on the Board itself the duty of holding the inquiry, and it was decided that in doing so the Board was in a quasi-judicial position and was bound by the ordinary rules of natural justice. No such obligation is laid on the Minister of Health by the Housing Act, 1930. He is not enjoined to hold a public inquiry. On the contrary, para. 4 of Sch. I. to the Act makes it clear that, if there is an objection, he shall, as an administrator, before confirming the order, cause a public inquiry to be held and shall consider any objection that is not withdrawn and the report of the person who holds the inquiry. That language excludes the notion of the Minister himself holding an inquiry or of performing any of the functions which a person would have to perform as a judicial officer. The person sent by the Minister to hold the inquiry is, of course, in a quasi-judicial position, and no one would suggest that he could hear one side behind the backs of the other or found his report on information not known to both parties.

I am, however, bound by the decision in *Errington* v. *Minister of Health* (2), and I adopt for the purpose of my judgment the following words of Greer L.J.: "In so far as the Minister deals with the matter of a confirmation of a closing order in the absence of objection by the owners, it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such inquiries as he thinks necessary to enable him to make up his mind whether it was in the public interest that the Order should be made. But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. It seems to me that in deciding whether a closing order be made in spite of the objections which have been raised by the owners it seems to me reasonable that the Minister should be regarded as exercising quasi-judicial functions." I accept that. From the moment an objection is made the Minister is exercising quasi-judicial functions, but it seems to me to be clearly recognized by the Court of Appeal that up to the time of objection being made the Minister acts in an administrative, and not a judicial, capacity.

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(1) [1915] A. C. 120.

(2) Ante, p. 249.

In the present case it is said against the order that before any objection had been made the town clerk approached the Minister for advice regarding this clearance scheme. I should have thought that that was an essentially sensible thing to do. Local authorities require the help of the Minister in determining the form which their applications should take, and they may discuss with the Ministry the substance of the applications. In my view the Minister, or his representatives, is entitled, at any rate up to the moment of objection being made, to give them such advice as he thinks fit.

Mr. Pritchard's third point was that the advice given by the Minister of Health was wrong, and that it is incorrect to say that the effect of s. 4 of the Act of 1930 is that the property of a local authority which has been acquired for purposes other than those specified in s. 4 cannot be included in a clearance order. Having regard to the view which I have expressed on the other contentions, it does not seem to me that I need determine whether the Minister's view of s. 4 is correct. Whether his law was right or wrong he was entitled, at the time when he expressed his opinion, to do so, and his accuracy or otherwise could not affect the question raised about there being no resolution on which to base the order which the Minister confirmed.

For these reasons this appeal fails and must be dismissed.

Application refused.

Solicitor for applicants: *E. Lloyd, Liverpool.*
Solicitor for Minister: *Solicitor to Minister of Health.*

G. F. L. B.

Followed. LONDON COUNTY TERRITORIAL AND AUXILIARY FORCES ASSOCN. *v.* NICHOLS. [1948] 2 All E.R. 432.

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Oct. 15, 26.

WHEELER *v.* WIRRAL ESTATES, LIMITED.

Landlord and Tenant—Rent Restriction—Standard Rent—Letting by Crown—" First let "—" Progressive rent "—Notice to quit and notice to increase rent in one document—Validity—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*).

Premises belonging to the Crown were let to the plaintiff in 1916 at a rent of 9*s.* 6*d.* per week, subsequently reduced by the Crown to 7*s.* 2*d.* per week. The Rent Restriction Acts did not apply, because those Acts did not affect the Crown. Subsequently, in 1928, the Crown sold the premises to the defendants subject to the plaintiff's tenancy at the same rent of 7*s.* 2*d.* per week. The Acts then applied to the premises except during the continuance of the plaintiff's original tenancy. In 1929 the defendants gave the plaintiff notice to quit with an alternative, in the same document, of an increase of the rent to 10*s.* 6*d.* per week, being the permitted increase on the basis of a standard rent of 9*s.* 6*d.*, at which rent the premises had been in fact first let to the plaintiff:—

Held, that the words " first let " in s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, meant first let in fact without reference to the Rent Restriction Acts, and that, therefore, the premises were first let in 1916, and the statutory rent was consequently 9*s.* 6*d.* per week.

Clark v. *Mead* (1933) 149 L. T. 308 overruled.

Held, further, that the rent of the premises after the sale by the Crown, 7*s.* 2*d.* and 10*s.* 6*d.* per week, was not a " progressive rent " within the meaning of the above section, a progressive rent being a rent under one single tenancy which automatically rises during the continuance of that tenancy. The above rents were payable under different tenancies.

Held, further, that the notice to quit was good, there being no reason why the notice terminating the tenancy and the notice to increase the rent should not be on the same piece of paper.

APPEAL from Woolwich County Court.

The respondents, the defendants, Wirral Estates, Ld., were the owners, and the appellant, the plaintiff, Wheeler, was the tenant of a dwelling-house, one of a large number built by the Government in 1916 for occupation by munition workers. It was first let by the Crown in 1916, at 9*s*. 6*d*. per week, to the appellant, that rent being subsequently reduced by the Crown to 7*s*. 2*d*. per week. In October, 1928, the Crown sold the premises to the respondents, subject to the appellant's tenancy, the rent then being 7*s*. 2*d*. per week.

On June 1, 1929, the respondents served on the appellant a notice to quit on June 10, 1929. The notice continued "or in the alternative take notice that we intend to increase the rent of 7*s*. 2*d*. per week to 10*s*. 6*d*. per week." This increase was based on the assumption that the standard rent was 9*s*. 6*d*. per week, and it was to date from July 1, 1929.

The county court judge, considering that he was bound by *Clark* v. *Mead* (1), held that the standard rent was 10*s*. 6*d*. per week, being the rent at which the house was first let after the tenancy created by the Crown had terminated—namely, on June 10, 1929. Alternatively he held that the standard rent was 10*s*. 6*d*., on the ground that the rent was a "progressive rent" within s. 12, sub-s. 1 (*a*). He held that the rent paid to the Crown was not the standard rent, on the ground that at the time of the letting by the Crown the Rent Restriction Acts did not apply, the Crown not being affected thereby.

The plaintiff appealed.

Sir Stafford Cripps K.C., *Cyril Salmon* and *Graham Swanwick* for the plaintiff, the appellant. It is true that when these premises were let to the plaintiff by the Crown in 1916 the Rent Restriction Acts did not apply, because those Acts do not affect the Crown: *Clark* v. *Downes*. (2) When the Crown sold the premises to the defendants the Acts applied to them except during the tenancy of the plaintiff—*Wirral Estates, Ld.* v. *Shaw* (3)—which continued. At the date of the sale the

(1) 149 L. T. 308. (2) (1931) 145 L. T. 20.
(3) [1932] 2 K. B. 247.

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rent was 7*s.* 2*d.* per week, and a new tenancy was created to which the Act did not apply, when the defendants first accepted the first payment of that rent. The premises, accordingly, were then "first let" within the meaning of s. 12, sub-s. 1 (*a*), and the standard rent is 7*s.* 2*d.* The standard rent is not 10*s.* 6*d.*, because the premises, as appears above, were not "first let" when that rent was fixed, having, as already shown, been let previously at 7*s.* 2*d.* Nor is it 10*s.* 6*d.* as the maximum of a progressive rent within the meaning of s. 12, sub-s. 1 (*a*), because these different rents were not a progressive rent, not having been fixed at the beginning of one continuing tenancy, but being different rents under different tenancies. In *Clark* v. *Mead* (1) the point was the same as in this case, but that case was wrongly decided.

[*Bury* v. *Thompson* (2); *Ahearn* v. *Bellman* (3); *Kerr* v. *Bryde* (4); and *Perry* v. *Eames* (5) were also referred to.]

Russell Vick and *M. L. Lyell* for the respondents. These premises were let at a progressive rent—7*s.* 2*d.* and 10*s.* 6*d.* per week—within the meaning of s. 12, sub-s. 1 (*a*), of the Act, therefore the maximum rent, 10*s.* 6*d.*, is the statutory rent. And it is also the statutory rent as being the rent at which the premises were "first let" after the plaintiff's Crown tenancy terminated. The letting by the Crown in October, 1916, was not a letting within the meaning of the Act, as the Act did not apply to the Crown, and the words "first let" in s. 12, sub-s. 1 (*a*), must refer to a letting to which the Act applies, for they have reference only to the fixing of the standard rent, which is a creature of the Act. If the basis adopted fixes the standard rent so low as 7*s.* 2*d.* per week that would injuriously affect the value of the reversion in the hands of the Crown, and it is the duty of the Courts so to construe the Act that the property of the Crown is not prejudicially affected: per Romer L.J. in *Clark* v. *Downes*. (6) Otherwise the Act would, in effect, apply to the Crown. *Clark* v. *Mead* (1) was rightly decided.

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(1) 149 L. T. 308.
(2) [1895] 1 Q. B. 696.
(3) (1879) 4 Ex. D. 201.
(4) [1923] A. C. 16.
(5) [1891] 1 Ch. 658.
(6) 145 L. T. 20, 22.

Sir Stafford Cripps K.C. replied.

Cur. adv. vult.

1934. Oct. 26. The following judgments were read :—

LORD WRIGHT. The argument in this appeal has been limited to the question what is the standard rent of the premises of which the appellant is the tenant and the respondents are the owners. The premises, 5 Rosyth Road, Eltham, consist of a dwelling-house which is one of a large number built on the same estate by the Crown in 1916 for occupation by munition workers. It was first let in September of that year at a rent of 9*s.* 6*d.* a week. The Crown remained the landlord until October, 1928, when the premises were sold to the respondents. When the appellant became tenant in 1916 he paid at first 9*s.* 6*d.* per week rent; later the rent he paid was changed by the Crown to 7*s.* 2*d.* per week. On June 1, 1929, the respondents served on the appellant a notice in the following terms: "We hereby give you notice to quit and deliver up to us as authorised agents on June 10 next the house and premises situate at 5, Rosyth Road, Eltham, as a weekly tenant, or in the alternative, take notice that we intend to increase the rent of 7*s.* 2*d.* per week to 10*s.* 6*d.* per week being a proportion only of the full increase allowed under the Act which is 11*s.* 9*d.* per week." This sum was based on the assumption that the standard rent was 9*s.* 6*d.* per week. It is not here necessary to discuss the correctness of the increase claimed, since that point has not been argued in this Court. The notice went on to state that the increase was to date from July 1, 1929, being four clear weeks from the date of the notice.

Three different figures were put forward in argument on either side as representing what the standard rent should be—namely, 7*s.* 2*d.*, 9*s.* 6*d.* and 10*s.* 6*d.* The first figure was based on the contention that the first rent at which the premises were let was 7*s.* 2*d.*, which was the rent first paid after the premises ceased to belong to the Crown or to be held under a tenancy originally created by the Crown, and accordingly first became subject to the Rent Restriction Acts

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(hereinafter called "the Acts"). The figure of 9*s.* 6*d.* was based on the fact that the premises were actually first let after they were built in 1916 at that rent, it being contended that it was immaterial that the Act as then in force did not apply to them as they were Crown property. The third figure is based on the contention that under the notice set out above 10*s.* 6*d.* is a progressive rent.

The case thus involves the construction, on the facts set out above, of s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. But, before dealing with this matter of construction, it is necessary to consider certain questions raised in regard to the notice of June 1, 1929. These questions seem to me to be questions of law arising on the document and the admitted facts. This seems to remove a difficulty I have felt in ascertaining exactly what would be the county court judge's finding of fact. He was no doubt embarrassed because he had already come to a decision on identical facts in another case and had there fixed the standard rent at 9*s.* 6*d.* or alternatively 10*s.* 6*d.*; but the parties to the present case requested him to deal with the issue de novo. This he consented to do in view of the decision of a Divisional Court in *Clark* v. *Mead* (1), which I shall discuss later. This decision bound him, and he followed it in the judgment now under appeal, in which he determined that the standard rent is to be fixed at 10*s.* 6*d.* as being the rent at which the house was first let after the tenancy created by the Crown had terminated. But he also was prepared to hold in the alternative that if the view that the rent of 10*s.* 6*d.* was a progressive rent were correct, a new tenancy was created when the tenant stayed on after June 10.

In my judgment, the effect of the notice given and of what was done under it (all of which is admitted) was to create a new weekly tenancy at 7*s.* 2*d.* a week for the period between June 10 and July 1, followed by a further new tenancy when the appellant stayed on as tenant, as he did, after July 1. Both these latter tenancies were subject to the Acts, and therefore the landlord could not charge any rent beyond the standard rent, subject to increases, if any, permitted by the Acts. For the period up to June 10, the tenant stayed on as under a common law tenancy; the Crown sold the property subject to existing tenancies; the tenancy under which the appellant held before the sale was unaffected by the Acts, which do not bind the Crown. The appellant thus continued on the same footing under the new landlord until a new tenancy was created, which was the case when he stayed on after the notice to quit. That this is the position in law on the facts of this case has been laid down by the decision of the Court of Appeal in *Wirral Estates, Ld.* v. *Shaw* (1), approving *Clark* v. *Downes.* (2) That decision, which binds this Court, can only however apply here on the assumption that the notice is good. But it has been contended that the notice cannot be treated as valid in law because it was ambiguous and uncertain. I cannot accept that argument. In my judgment the notice was perfectly clear and unambiguous. It first of all was a notice terminating the common law tenancy as on June 10: that is unambiguous and stands clear of what follows. The notice next contained an offer to the tenant to stay on for three weeks as a weekly tenant at 7*s.* 2*d.* a week. If he stayed on and paid rent at that rate, as he in fact did, then a weekly tenancy was created at 7*s.* 2*d.* a week. To this tenancy the Acts necessarily applied, because the dwelling-house was one to which the Acts applied when the Crown tenancy was out of the way; but as the standard rent was admittedly at least 7*s.* 2*d.*, the question of what was the standard rent was not so far in controversy. The appellant might have given a week's notice terminating that tenancy of three weeks, but he did not. He stayed on, and a new tenancy was accordingly created as from July 1 and also a weekly tenancy, at a weekly rent of 10*s.* 6*d.* if that rent was permitted by the Acts, but in any case on the basis of the standard rent. The appellant admittedly so acted as to accept that tenancy.

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(1) 149 L. T. 308.

So far I have assumed that the notice was good. In my judgment it was good, not only because, as I have stated, it was, in my opinion, perfectly clear, but also because I think the matter is concluded by the authority of *Ahearn* v. *Bellman* (1), followed in *Bury* v. *Thompson.* (2) The validity of a similar notice was not questioned in *Wirral Estates, Ld.* v. *Shaw.* (3) That a notice to increase rent was invalid unless it was accompanied or preceded by a notice determining the tenancy was held by the House of Lords in *Kerr* v. *Bryde.* (4) I cannot see why both notices should not be found on the same piece of paper. Indeed the Rent Restrictions (Notices of Increase) Act, 1923 (13 & 14 Geo. 5, c. 13), which says in s. 1, sub-s. 1, that a notice of intention to increase rent is to be deemed to have effect as if it were also a notice to terminate the existing tenancy confirms this conclusion as regards cases falling within the Acts.

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(1) [1932] 2 K. B. 247.

(2) 145 L. T. 20.

On this view of the matter, I do not think the rent of 10*s.* 6*d.* as after July 1, 1933, can be justified as a progressive rent within the meaning of s. 12, sub-s. 1 (*a*), of the Act of 1920. The Act does not contain a definition of the term " progressive rent," which is not, so far as I know, a term of art, but appears for the first time in this Act. The words of sub-cl. (*a*) are that if the house be let at " a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent." But in the present case the rent of 7*s.* 2*d.* was payable under the weekly tenancy, terminating on July 1, and the rent of 10*s.* 6*d.* was payable under the new weekly tenancy commencing from that date ; indeed that new tenancy might not ever have commenced, because the tenant could have given a week's notice and thereby put an end to the relationship of landlord and tenant. The words of the Act make it clear, as I think, that what is meant is a rent under one single tenancy and a rent which automatically rises during the continuance of that tenancy. This is a reasonable procedure where, as often happens, the tenant does not derive the full benefit of the tenancy in the first year or years, or is being allowed to recoup himself in the

(1) 4 Ex. D. 201.
(2) [1895] 1 Q. B. 696.
(3) [1932] 2 K. B. 247.
(4) [1923] A. C. 16.

earlier period for his outlays. I do not think the 10*s*. 6*d*. is a progressive rent.

The next question is what is the standard rent for the purposes of this case. Standard rent is defined in s. 12, sub-s. 1 (*a*), as "the rent at which the dwelling-house was let on the third day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let." The appellant's claim was that the house was first let on June 10, 1929, since the previous letting was under a tenancy from the Crown to which the Acts do not apply, and as the Acts do not apply to the Crown, any letting by the Crown, it was contended, is to be disregarded for all purposes of the Acts; indeed no evidence of letting is admissible, so it was said, until after the Acts have begun to apply on the determination of the Crown's interest or of any tenancy created by the Crown; only after that date can there be, it was contended, a "first letting" within the meaning of the Acts. I do not think this contention can be justified. Sect. 12, sub-s. 1 (*a*), is dealing with actual fact, that is to say it is dealing with a specific dwelling-house and the specific fact of that dwelling-house being let for the first time. It may well be that at that date the house was not within the Acts; indeed the date may have been before ever any Rent Restriction Act had been passed; the house may have been first let between August 3, 1914, and the earliest of these Acts, that of 1915, or the standard rent may be the rent at which the house was let, though not first let, on August 3, 1914. The house may never come within the Acts at all. As Atkin L.J. points out in *Sinclair* v. *Powell* (1): "It may be noted, in order to determine whether the Act applies, that all houses have a standard rent; it is only where the standard rent does not exceed the amount of the statutory limit that the house falls within the Act." In my judgment, the dwelling-house in question was first let in 1916 at a rent of 9*s*. 6*d*. a week; I think that is the standard

(1) [1922] 1 K. B. 393, 405.

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rent for the purposes of this case. It is, in my opinion, immaterial whether the first letting was or was not by the Crown, even though, as is clearly the case, the Crown is not bound by the Acts.

But it is truly said that so to hold is to differ from and to overrule the decision of the Divisional Court in *Clark* v. *Mead* (1), to which I have already referred. With great respect to the learned judges who decided that case, I find myself unable to agree with them. The facts in that case were similar. It was there held that the standard rent was 7*s.* 3*d.*, the first rent after the Crown tenancy was determined, and not, as the county court judge had held, 9*s.* 6*d.*, which was the rent at which the house had been first let by the Crown. The Judges were of opinion that they were bound so to conclude by the decision of this Court in *Wirral Estates, Ld.* v. *Shaw* (2) and of a Divisional Court in *Clark* v. *Downes.* (3) They went on to say that these decisions, but in particular certain observations of Romer L.J., governed the matter. The decisions themselves, in my opinion, throw no light on the question which is material in this case. In *Wirral Estates, Ld.* v. *Shaw* (2) this Court held that though the Acts did not bind the Crown and though that immunity continued so long as the Crown tenancy lasted, even after the Crown had disposed of the reversion, it ceased as soon as a new tenancy was created. In my opinion this decision, which followed a case in the Divisional Court of *Clark* v. *Downes* (3), has no bearing on the present case, in which what has to be determined is what is the standard rent, even though the facts which determine that standard rent occurred while the Acts did not apply by reason of the Crown's immunity. But in *Clark* v. *Mead* (1) the Court relied on certain observations of Romer L.J. in *Clark* v. *Downes* (4) as going much further than the actual decision. In particular they relied on an opinion of the Lord Justice (4) that we must read sub-s. 2 of s. 12 as though in express terms it said: "This Act shall apply to a house other than a house belonging to the Crown."

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(1) 149 L. T. 308.
(2) [1932] 2 K. B. 247.
(3) 145 L. T. 20.
(4) Ibid. 22.

This statement seems to me incontrovertible, but I must repeat that I cannot see how it can affect the determination of the standard rent. In argument we were strongly pressed with certain other observations of Romer L.J. in *Clark* v. *Downes* (1), where he says: "The Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts. Now, if the learned county court judge is right and these houses became subject to the operation of the Acts, the moment they passed out of the ownership of the Crown it follows that the reversion to the houses while in the possession of the Crown was worth considerably less than it would have been but for the Acts. The Acts so construed, therefore, would prejudicially affect the property of the Crown. Having regard to what I have said, the Acts should therefore not be construed in that way." It was sought to apply these words, with this result, that the Crown would be prejudiced if after it sold its property the standard rent was fixed at the date at which the house was first let, where it was subsequently let at a higher rent after the determination of the Crown tenancy. It may be enough to say that on the converse facts the Crown would be not prejudiced but benefited. But I cannot accept the use which it was sought to make of these observations in argument. It was sought to press them beyond what I regard as their intention. If they were to be read as contended for on behalf of the appellant, the case of *Wirral Estates, Ld.* v. *Shaw* (2) must it seems have been decided otherwise. This is pointed out by Talbot J. in the Divisional Court in that case, where the Court was pressed with the dictum. The learned Judge said this (3): "But what the learned Lord Justice said is satisfied, in my opinion, by that which the appellant here is content to assume to be right—namely, that where the property is sold with an existing tenancy, the purchaser, like the Crown, is exempt from the operation of the Rent Restrictions Acts. But what is said, and in one sense it is true, is that if the Lord Justice's words are to be followed literally, the operation of the Acts must inflict no disadvantage at all on the Crown. If so, this consequence would ensue, that, however many times the reversion changed hands and however many new tenancies were created, still this and other houses in the same position would remain, so long as these Acts operate, exempt from their operation. I, personally, am not prepared, in the absence of any authority, to extend what possibly may in itself seem to be rather an extreme application of the doctrine with regard to the effect of statutes on the Crown." I agree with these observations. The immunity is in this as in other cases limited to the period of Crown occupation and user, and to whatever other period is justified by the decision in *Wirral Estates, Ld.* v. *Shaw.* (1) It cannot extend to the possibility of a remote prejudice or exclude a legitimate application of the terms of an Act after the Crown's interest has ceased. If the argument on behalf of the appellant, based, as I think, on a misconception of the meaning of Romer L.J.'s observation, were right, it might be said that for instance the Crownship should not lose the immunity which they in general enjoy from statutory dues, because if such immunity were extended to them in the hands of purchasers the Crown could get a better price on sale. I cannot find that any such rule has ever been recognized. Instances could be multiplied indefinitely. It is not, as I think, the law that property which while belonging to the Crown has obtained an immunity from conditions and charges under statutes which do not bind the Crown retains that immunity after the Crown's interest has ceased.

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(1) 145 L. T. 22.

(2) [1932] 2 K. B. 247.

(3) Ibid. 251.

I think *Clark* v. *Mead* (2) was wrongly decided, and that it does not follow that, because the Crown is not bound by the Acts that the standard rent is not to be ascertained by reference to the first letting in 1916, which was while the property belonged to and was let by the Crown.

SLESSER L.J. In this case I need not repeat the facts which have been stated by Lord Wright, nor need I add anything to what he has said as to the questions of notice and progressive rent. I propose to confine my observations to the question of standard rent in the circumstances of this case. The learned county court judge has found himself, among other matters, bound by the decision of the Divisional Court in *Clark* v. *Mead* (1) to hold that in considering the meaning of s. 12, sub-s. 1 (*a*), of the Increase of Rent, etc., Act, 1920, the expression " first let " cannot include a letting of the property of the Crown, and, therefore, this case resolves itself, primarily, into a consideration whether *Clark* v. *Mead* (1) was rightly decided. It is true that in the case of *Wirral Estates, Ld.* v. *Shaw* (2) the Court of Appeal decided that the Rent Restriction Acts do not affect premises owned by the Crown—that is so far as regards a tenancy originally created by the Crown (see *Clark* v. *Downes* (3))—though otherwise after the tenancy created by the Crown has come to an end. I cannot think, however, that the principle that where the Crown is not expressly named an Act is to be construed so as not prejudicially to affect the Crown or its property is a sufficient reason for saying that where in fact the Crown has first let property, such letting shall not be considered as a first let within the meaning of s. 12, sub-s. 1 (*a*), of the Act of 1920. Acton and Finlay JJ. in *Clark* v. *Mead* (1) appear to have assumed that such a conclusion was necessarily forced upon the Court by the decision in *Clark* v. *Downes* (3) and in the *Wirral Estates* case. (2) These cases were dealing with the actual rights of the Crown over its property as affected by the Rent Restriction Acts and do not seem to me at all to conclude the question which we have here to consider—namely, whether an admitted first letting by the Crown is not a first letting within the meaning of the statute. Sir Stafford Cripps, I think, oppressed by this fact, attempted to uphold the present finding by arguing that, in so far as if a letting were to include Crown property the reversionary value of the property to a purchaser might be affected after the Crown had parted with the tenancies, to hold that a first

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(1) [1932] 2 K. B. 247.

(2) 149 L. T. 308.

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(1) 149 L. T. 308.
(2) [1932] 2 K. B. 247.
(3) 145 L. T. 20.

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letting would include a Crown letting might prejudice the Crown, but equally it might not. The standard rent in the case of a dwelling-house which was first let after August 3, 1914, is to be taken to be the rent at which it was first let, and the amount of the rental which may be demanded may, therefore, be higher or lower if the Crown be included or excepted and the value of the reversion increased or decreased, according to the circumstances of the particular case. Whatever may be the precise ambit of the doctrine which excludes statutes which prejudice its property from affecting the Crown, I cannot think that it can be extended to include cases where there is on one set of facts a contingent chance of prejudice and on another set of facts a contingent chance of benefit. It cannot be that the determination of whether what was in fact a first letting includes a first letting by the Crown can depend upon the amount of the rental compared with the rental charged by a subsequent landlord in a particular case. To hold otherwise would be to include a first letting of the Crown when that letting was higher than a later one, when the standard rent would be greater and so the reversionary value higher, and to exclude a case where the first letting was lower than a later one. So that to ascertain the standard rent in any particular case it would be necessary to inquire whether in such a particular case the fixing of the standard rent by reference to a first letting by the Crown would or would not tend to prejudice the Crown. Such a consequence would be to produce an absurdity. But in any event I do not think that the language of s. 12, sub-s. 1 (*a*), as such raises the problem of the Crown's exemption at all. The words are a " dwelling-house . . . . which was first let," and in fact the dwelling-house here under consideration was first let in this case by the Crown. Whether the Crown is itself bound or not, none the less, in computing the standard rent as between subjects, I can find no ground to exclude the Crown's first letting as an element in the final ascertainment of standard rent.

For these reasons I agree that the case of *Clark* v. *Mead* (1) was wrongly decided, and for this and the other reasons stated by Lord Wright as to notice and progressive rent I agree that this appeal should be allowed.

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(1) 149 L. T. 308.

TALBOT J. In this case a dwelling-house belonging to the Crown had been sold by the Crown subject to an existing tenancy. While the Crown was owner, or until the tenancy granted by the Crown had been determined, the house was not subject to the Rent Restriction Acts; *Clark* v. *Downes* (1); *Wirral Estates, Ld.* v. *Shaw.* (2) But it is admitted that after the purchase of the Crown's reversion the purchaser did determine the tenancy granted by the Crown, and granted a new tenancy, and thereupon, according to *Wirral Estates, Ld.* v. *Shaw* (2), which binds this Court, the house became subject to the Rent Restriction Acts. The question then arises, and that is the only question which in this appeal we have to determine, What is the standard rent for the purposes of the Acts? For this we have to look at s. 12, sub-s. 1 (*a*), of the Act of 1920, and inasmuch as the house did not exist on August 3, 1914, the letting which fixes the standard rent will be the first letting after that date. It is said for the plaintiff, who wishes, of course, to cut down the standard rent as low as possible, that this cannot include a letting by the Crown, because the statute does not bind the Crown; and he asks for the rent (7*s.* 2*d.*) which was first paid after the tenancy to the Crown had been determined. The respondents, on the other hand, ask for 9*s.* 6*d.*, the first rent at which the Crown let, and they say that to call this an interference with the prerogative when the standard rent can only operate after all interest of the Crown in the house has ceased, is ridiculous. On the other hand, it is said that any reduction of the standard rent diminishes the rent which a purchaser from the Crown can get on a fresh tenancy, and consequently diminishes the price which he would pay to the Crown for the reversion. It cannot be denied that in this and other like ways it may be shown that some money loss to the Crown as sellers of land would or might result; but in my opinion to extend the prerogative right so far would be going beyond what is legitimate. The effect of legislation ramifies indefinitely, and to admit reasoning of this kind would lead, it seems to me, to very artificial and fantastic results. It was observed during the argument that if the appellant is right on this point, it would equally affect the meaning of the word "let" in the other two cases under s. 12, sub-s. 1 (*a*), with even more unnatural results. It was suggested that if "let" in s. 12, sub-s. 1 (*a*), be held to include a letting by the Crown, it must equally be so read in sub-s. 2: "This Act shall apply to a house . . . . let as a separate dwelling," etc. This seems to me quite unsound. As at present settled, it is clearly law that the Rent Restriction Acts do not (generally) bind the Crown; and if sub-s. 2 were construed as suggested by inserting "whether by the Crown or by a subject" (or the like), this would obviously be abrogated; that is, the decisions of the Courts which have established the exemption of the Crown would be annulled.

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(1) 145 L. T. 20.

(2) [1932] 2 K. B. 247.

I wish to add something about *Perry* v. *Eames* (1), which was relied on by the plaintiff. The only point there which comes near this case is this. There was a property over which ancient lights were claimed; from 1820 to 1886 this property was held by trustees for the Crown, and it was held that during that time no easement of light could be acquired over it because the Crown is not named in s. 3 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71). In 1886 the Crown sold the land to the Corporation of London, from whom the defendant derived title. It was argued for the plaintiff, who claimed an easement of light, that assuming that no such easement could have been established against the Crown while it remained owner, the plaintiff was entitled, now that the land was vested in a subject, to establish the enjoyment of the easement for twenty years under the statute by including so much as was necessary of the time which had elapsed while the Crown was still owner. Chitty J. rejected this contention on the ground that it interfered with the property right which the Crown had had, because instead of having

(1) [1891] 1 Ch. 658.

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land to dispose of which was subject to no easement of light, it would then have had land over which an easement was in process of being acquired; in other words, the plaintiff was relying on an enjoyment of light which had taken place at a time when it could confer no right at all. It was a direct abridgment of the value of Crown land by a statute by which the Crown was not bound. There is obviously some apparent resemblance between that case and the present, but in my opinion the cases are really very different. In *Perry* v. *Eames* (1) the plaintiff was basing his claim on a fiction—namely, that the statutory period under the Prescription Act, 1832, had begun when in fact it neither could nor did begin. Here it is merely that, it being the law that the exemption of the Crown from the Rent Restriction Acts by virtue of its prerogative enures to a purchaser from the Crown so long only as the tenancy the reversion on which is bought exists, there is only an indirect interference with the Crown's property rights involved in dating the time by which the standard rent is to be fixed, when the Restriction Acts do thus become applicable, as from a letting by the Crown.

Solicitors for appellant: *Schultess-Young & Dupont.*
Solicitors for respondents: *Woodroffes.*

W. L. L. B.

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(1) [1891] 1 Ch. 658.

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WILLIAMS-ELLIS *v.* COBB AND OTHERS.

Highway—Footpath crossing private land—Evidence of public user throughout living memory—No owner with power to dedicate—Inference of anterior dedication—Way ending at high-water mark—Terminus ad quem.

The plaintiff claimed damages against several defendants for trespassing over his land, and asked for an injunction. The defendants alleged that they were lawfully exercising public rights of way. Evidence was given of public user by five different classes of persons, extending over the whole period of living memory, of two defined ways over the plaintiff's land from a public high road to the sea at high-water mark. It was also proved that the plaintiff's land was in strict settlement from 1856 to 1908, and that during that period there was never an owner capable of dedication. The county court judge held that there being no owner capable of dedication during the period of proved public user, he was not entitled to infer dedication from such user. He held also that the ways claimed by the defendants had no sufficient terminus ad quem. On appeal

Held, (1.) that although the public have only limited rights over the foreshore, the sea may be a sufficient terminus ad quem for a public way, which may now be proved, even though it does not lead to a public place.

Moser v. *Ambleside Urban District Council* (1924) 89 J. P. 59; affirmed in C. A. 89 J. P. 118 applied. *Blundell* v. *Catterall* (1821) 5 B. & Ald. 268 and *Brinckman* v. *Matley* [1904] 2 Ch. 313 considered.

(2.) that where there is evidence of public user of a way throughout the period of living memory, but there has been no owner of the land capable of dedication during that period, the tribunal of fact which has to decide the issue of dedication or no dedication may infer a dedication at some date anterior to the earliest proved user by an owner capable of dedication. But (3.) there is no praesumptio juris to compel the tribunal to draw such an inference even from unrebutted evidence of long-continued and uninterrupted user.

Dictum of Parke B. in *Poole* v. *Huskinson* (1843) 11 M. & W. 827 at p. 830 applied. *Folkestone Corporation* v. *Brockman* [1914] A. C. 338 and *Stoney* v. *Eastbourne Rural District Council* [1927] 1 Ch. 367 discussed and followed.

APPEAL from Pwllheli County Court.

The plaintiff claimed against a number of defendants damages for trespass to the plaintiff's land, and an injunction. The defendants alleged that they were not trespassers but acting lawfully in exercise of a right of way. The county court judge gave judgment for the plaintiff, awarding 5*l.* damages and granting an injunction, and the defendants appealed.

The facts are set out in detail in the written judgments of the Court of Appeal, from which the arguments of counsel also clearly appear.

Trustram Eve for the appellants.

Ralph Sutton and *J. A. Reid* for the respondents.

Cur. adv. vult.

1934. Nov. 2. The following judgments were read :—

LORD WRIGHT. The action out of which this appeal arises was brought in the County Court of Pwllheli before Judge Artemus Jones. The plaintiff is the owner of an estate in Carnarvonshire, and the defendants were sued for trespass. Their defence was that they were not trespassers, but acting lawfully in exercise of a public right of way. There was also a claim based on a local customary right of the inhabitants, which is not now material. Neither the Attorney-General nor the County Council were parties; thus no question of public right could be determined by the proceedings in which the issue of the right of way arose merely as between the parties by reason of the defence set up by the defendants. The learned judge decided in favour of the plaintiff, awarded 5*l.* damages for trespass, and granted an injunction. The defendants now appeal.

The land over which the right was claimed is a headland called Penrhyn Du, on the Carnarvonshire coast, near St. Tudwal's Islands, a few miles from Abersoch and Pwllheli. Two pathways were claimed as being subject to rights of way: one runs along the cliff, running up to the point where there is a gap in the cliff about 20 feet high at that place, by which access may be obtained to the sea, which comes to the bottom of the cliff at high water. At low water the sea can only be approached by passing over the foreshore. At some time a tram line had been laid over this track, and for this purpose the rock had been cut. A lifeboat house was built near the point in about 1894 on a piece of ground let for that purpose by the plaintiff's predecessor. The other track led to a small cove called Porth Bach, a short distance away, where a path led down the cliff, there about 30 feet high, to the sea, or foreshore. Recently the plaintiff has put steps there as for his private user. No claim was made in reference to these steps. The path had been stopped some years ago by a fence, but a gate was placed somewhat to the right of the original path, and the defendants claimed that they were not trespassers in using the alternative track to Porth Bach, which they alleged had thereafter been used. The land in question had been the scene of mining operations, it seems, since the eighteenth century at least. Three mining leases of 1846, 1859, and 1870 were put in, and old shafts still remain.

Mr. Trustram Eve, in a very able argument for the appellants, claimed that the judge's detailed findings of fact embrace findings of user up to the limit of living memory from which, in the absence of matters established to rebut the prima facie presumption arising from them, there necessarily followed as a matter of law the conclusion that the right of way was made out. He urged that no such facts in rebuttal were found by the judge. He contended that the judge was thus bound to find for the defendants, and that this Court should enter judgment for them. In particular, Mr. Trustram Eve relied on the judge's findings, which were thus summarized in the judgment: "The effect of the evidence," so the judge proceeds, "of Mr. Cobb and the other witnesses for the defence was to show that five different classes of people had, during the last sixty years, or more, used the pathways: (1.) sailors in vessels riding in St. Tudwal's Roads, who rowed to and landed upon Penrhyn Du or Porth Bach for the purpose of buying ashore potatoes and other things; (2.) tenants of grazing land at St. Tudwal's Islands who used to embark and land at both points (though there was evidence that some also embarked and landed at Abersoch and Pwllheli) for the purpose of landing or shipping sheep; (3.) mariners yachting off the coast, who rowed to and landed chiefly at Porth Bach; (4.) summer visitors to Abersoch, who used the path for the purpose of bathing and paddling and fishing at both points; (5.) some local fishermen who caught lobsters and placed their catch in a lobster pot at Porth Bach, and then carted them along the path to Gate A." Mr. Trustram Eve argued that there were no facts found to nullify the necessary conclusion from the judge's findings that there had been a dedication at some time in the past of these rights of way. The land, it was true, had been in strict settlement since 1856, but there was, admittedly, at least some period between 1820 and 1856 when the then owner had been capable of making a dedication, so that, on that ground, the presumption of dedication arising from the proved user could not be rebutted. He further contended that in case of either path there was a terminus ad quem, either to the edge of the cliff or the edge of the sea, so as to remove any objection that might have otherwise been raised on that ground. Mr. Trustram Eve went on further to contend that the judgment appealed from was vitiated because the four questions which the judge proposed to himself, in order to decide the case, involved material errors of law. These questions were thus stated by the judge: "Four questions are raised for determination in this case: (1.) whether these were public rights of way established at a period anterior to the construction of the tramroad in 1846; (2.) whether, during living memory, there was a person in possession of the land who was at all material dates in a position to make an effective dedication; (3.) whether the acts of interruption proved by the mining leases granted by the owners in 1846, and at subsequent dates, the lease granted by Lord Penrhyn to the Royal National Lifeboat Institution in 1894, and the fence put across one of the alleged paths by the plaintiff's father in 1908 were inconsistent with the hypothesis of dedication; (4.) whether the rule as to the terminus ad quem was broken by these two passages which terminated at the cliff side, or was it subject to the rights referred to by Buckley J. in *Behrens* v. *Richards* (1)." Each of these questions was answered by the judge adversely to the defendants' claim. Mr. Trustram Eve contended as to question 1, that on the findings of the judge it could only be answered in the affirmative; as to question 2, that it was irrelevant in law; as to question 3, that the leases were not inconsistent with the right of way, and that the fence merely led to a permissible deviation of the path; as to question 4, that, in law, in the case of each of the two alleged rights of way there was such a terminus ad quem as to complete the right of way.

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(1) [1905] 2 Ch. 614.

I shall consider later whether the judgment shows any such misconceptions of law as would justify the Court in sending the case back to the judge for him to reconsider his conclusion, or to set aside the judgment, and order a new trial, but I must hold that this Court has no jurisdiction to accede to Mr. Trustram Eve's submission, and enter judgment for the defendants. In my opinion the same principles apply in an appeal such as this on questions of a right of way from a county court as have long been applied in regard to such issues where a trial has been before a jury, or the facts have been found by a court of summary jurisdiction. Indeed, the case of an appeal from a county court is, if anything, a fortiori: see *Smith* v. *Baker & Sons* (1) and s. 120 of the County Courts Act, 1888. It is only the appropriate tribunal of fact that can decide the issue whether or not a right of way is established, because that issue depends on whether the tribunal is satisfied that there has been, in fact, a dedication, which can only be found if the necessary intention has been made out. There can only be dedication if there is the relevant intention, actual or presumed, of an owner capable in law of dedicating. In truth, Mr. Trustram Eve's contention has been discussed and rejected in principle by the House of Lords in *Folkestone Corporation* v. *Brockman* (2), where magistrates had held that there was no dedication, but the Court of Appeal, by a majority, had set aside that finding, and had held that: "These facts"—that is to say, those which had in detail been found by the magistrates—"amount in law to dedication." The House of Lords reversed that

(1) [1891] A. C. 325.

(2) [1914] A. C. 338, 346, 362.

decision. Lord Atkinson quoted, with approval, the words of Parke B. in regard to a finding of a jury in *Poole* v. *Huskinson.* (1) The quotation is this: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." Lord Atkinson thus stated (2) the contention which had prevailed in the Court of Appeal: "Proof of open, uninterrupted, and continuous user raises a praesumptio juris in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail. Tribunals which are exclusive judges of fact, whether juries or justices, are bound in law to act upon it, and their finding against it is an error in law. In the present case there was such evidence of user, no rebutting evidence was produced, the justices were therefore bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law." Lord Atkinson went on to say a little later (2): "The existence of this intention, which is crucial in such matters, being an inference of fact, the justices were clearly within their right in so refusing"—that is to find dedication—"unless it be the law that in such cases where open, long-continued, and uninterrupted evidence of user is clear, unrebutted, and unexplained, the tribunal whose members are the exclusive judges of issues of fact are bound in law to draw this affirmative inference, and consequently that in every case where the question of the dedication to the public of a highway is tried before a judge and jury, and strong evidence is given of user by the public, while no evidence rebutting the so-called praesumptio juris thereupon arising is produced, the litigant relying upon dedication must necessarily be entitled to have a verdict directed for him." Lord Atkinson observed that no authority could be

(1) 11 M. & W. 827, 830.

(2) [1914] A. C. 338, 361.

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found for the proposition which had been accepted by the Court of Appeal, and he went on to say (1): "On the contrary, the invariable well-established practice, followed by many of the most able and distinguished judges for many, many years, has, I think, been, no matter how strong the evidence of user, to leave all the evidence to the jury, to ask them to consider it as a whole, and determine whether the owner of the soil intended to dedicate to the public a highway over it." I need not pursue further the course of reasoning, and the authorities, by which Lord Atkinson developed and justified his statement of principle. It is enough to say that the rule which he applied in the case of justices applies equally, or, indeed, a fortiori, in the case of a decision on fact of a county court judge where the issue is dedication, or no dedication. Indeed, it must apply in every case where there is a designated tribunal of fact whose decision on such matters is final, subject only to the rule that the judgment may be set aside if it proceeds on a material error in law, and, in particular, if there is no evidence on which the finding can be arrived at, because no judge, even if sole judge of fact, has jurisdiction to find facts for which there is no evidence. That rule may well apply to an affirmative finding of dedication. To quote again Lord Atkinson in reference to para. 131 of Taylor on Evidence, 9th ed., he says (1): "The statement of the law contained in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect, that the uninterrupted user of a road justifies a presumption in favour of the original animus dedicandi even against the Crown. That is a wholly different thing from saying that this presumption is a praesumptio juris, which, if unrebutted, must be acted upon by exclusive judges of fact. This rule, relied upon by the respondents as to the unrebutted presumption of dedication, is a good working rule for all judges of fact to act upon. It is a rule which juries should be instructed to act upon, and which they ought to act upon, but it is, in my opinion, nothing more than that. An order made by such judges, in effect refusing to act upon it in favour of the person on whom the burden of proving dedication lies, cannot therefore, I think, be treated as a nullity, void at law, and made without jurisdiction. The practice of over a century in trials of such questions before juries establishes this."

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(1) [1914] A. C. 338, 362, 368.

I need not observe that where an appellate Court proceeds by way of rehearing of the evidence it becomes, in turn, judge of the facts, as, for instance, where the Court of Appeal is hearing an appeal from a trial judge in another Division of the High Court in a case of this type.

The principles which I have derived as applicable to an appeal to this Court from a county court judge are, in truth, only a particular application of the general rule that there is no jurisdiction in this Court to entertain an appeal on fact from the decision of such a judge, and in no case that I can conceive could this Court order judgment to be entered holding a right of way to be established where that had been negatived by the county court judge. But this Court, in a case of this type, even if it does not set aside the judgment, may send the decision back to the county court judge for reconsideration, not, however, on the facts, but only if it seems to the Court that he has proceeded, in some material respects, on erroneous views of the law. I think that this order should be made in the present appeal. I do not so think merely because, in certain respects, I do not feel disposed to take the same view as he did of certain pieces of evidence. For instance, he may have misread the important plan of 1795, and I do not understand why the lease of the lifeboat house, or the mining leases, or the use of the track to Penrhyn Du Point to lay a tramway are inconsistent with the rights of way claimed which were different from and more limited than, the rights of way necessary for the enjoyment of mines. Again, it seems doubtful whether the judge has fully appreciated the entries in the minutes of the local council as to repairs of the highway. I do not, however, desire to discuss the facts or the evidence, which are matters for the county court judge. But I do find certain matters of law on which the judge appears to have misdirected

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himself, and these seem of sufficient moment to make me think that the judge should reconsider the case in the light of the law stated by this Court. The first of these matters is contained in the second of the questions which the judge put to himself as quoted above. Question 2: "Whether, during living memory, there was a person in possession of the land who was at all material dates in a position to make an effective dedication." His answer to that question culminates in the conclusion: "I hold that as far back as living memory up to 1908 there was no person in possession of Penrhyn Du capable of dedicating it away to the user of the public." Then finally he says: "Such intention"—that is an intention to dedicate—"can be inferred only against a person in possession of the land who was at all material times in a position to make an effective dedication." In this part of his judgment he proceeded, I think, on what he had already stated, that both the facts set out in the settlement and in the documents of title raise the presumption that the land was in strict settlement up to 1908, from the second decade of the nineteenth century. But it is now admitted that on the true construction of the various settlements (the Court having been relieved of the task of construing them by this admission) between 1820 and 1856 there was some period in which there was an owner capable of dedication. The question whether, if dedication can otherwise be presumed, there was any one capable of dedicating within living memory is a false issue involving an error in law. If user is established over the period within living memory that raises a prima facie presumption of dedication, the date of which may be in a period beyond living memory. Such a date is not limited necessarily to the scope of living memory. On this matter I am relieved from the need of discussing it further by the reasoning contained in the judgment of Romer J. in *Stoney* v. *Eastbourne Rural District Council* (1), which was approved by the Court of Appeal. I desire to quote a short passage from that judgment: "As pointed out by Buckley J. in *Attorney-General* v. *Esher Linoleum Co.* (2), it is dedication and not user that constitutes a highway. User is merely the evidence that proves the dedication. Where the only user shown is user over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began. But where, as here, the user took place over the whole period covered by living memory, such user is just as good evidence of a dedication made a hundred years before the first proved act of user as of one made contemporaneously with that act."

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(1) [1927] 1 Ch. 367, 378.

(2) [1901] 2 Ch. 647.

The county court judge seems to have confused user, which is only evidence of dedication, with the dedication itself. As to the first question that he put to himself, I do not see why, as a matter of law, the date of 1846 should be taken as a crucial date if user has been established within living memory so as to raise a prima facie presumption of dedication which, as already explained, may go back to an indefinite date in the past; nor do I understand why, as a matter of law, the construction of the tram road or the grant of the leases should be considered to constitute acts of interruption, or go to negative dedication; but I pass to question 4, which I have already read, and which I need not repeat. The judge decides that: "The rule of the terminus ad quem is fatal to the claim set up by the defendants in this case." He then answers the question to the effect that although a public right of way may be acquired by long user over private property, it must have a public terminus. I am not clear what he means by "a public terminus." Then he also adds the reference to Buckley J.'s judgment in *Behrens* v. *Richards* (1) on the subject of what he calls "the right of public navigation" (though those actual words are not found in that judgment). The county court judge decides, as I follow his judgment, that this question of law is fatal to the defence. I think, with all deference to the judge, that he has taken a view on this question which is not, perhaps, very clearly enunciated, but, so far as I can judge, is narrower than the law, which in modern times has tended to a more liberal view of what may

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(1) [1905] 2 Ch. 614.

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be sufficient in regard to a terminus to constitute a right of way. It is no longer the law (if it ever was) that a highway must end in another public highway: see *Moser* v. *Ambleside Urban District Council.* (1) Thus a public right of way may lead only to a point of natural beauty: *Eyre* v. *New Forest Highway Board* (2), approved in *Moser* v. *Ambleside Urban District Council* (3); or to a church, or to the sea, or to a river: per Phillimore J. in *Tyne Improvement Commissioners* v. *Imrie and Others.* (4) I think that *Moser* v. *Ambleside Urban District Council* (3) is now an authority for the proposition that a right of way may be proved, even though it does not lead to a public place. I may again refer to *Moser* v. *Ambleside Urban District Council* (3) for the language of Atkin L.J., where he says: "I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise." The Lord Justice goes on to explain the decision in *Attorney-General* v. *Antrobus.* (5)

The right of way claimed in the present case is only over the land of the respondent which ends at the sea, and I think, on the authorities cited, such a right of way may be good in law. It seems that the judge has decided that the sea (which is a highway) cannot, in law, be a terminus ad quem to a public right of way, because the sea can only be reached at high water from what is claimed as the end of the way, and because the public have no right of crossing the foreshore (which at these places is presumably vested in the Crown, and is not alleged to be the property of the respondent). I do not think it necessary to express any decided opinion here on the difficult question of the extent of the rights of the public over the foreshore. It was decided in *Blundell* v. *Catterall* (6), followed by this Court in the case of *Brinckman* v.

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(1) (1924) 89 J. P. 59; affirmed in C. A. 89 J. P. 118, 120.

(2) (1892) 56 J. P. 517.

(3) 89 J. P. 118, 120.

(4) (1899) 81 L. T. 174, 179.

(5) [1905] 2 Ch. 188.

(6) 5 B. & Ald. 268.

Matley (1), that the public have no right to use the foreshore for purposes of bathing, and there is certainly no right in the public to pass and re-pass over the foreshore for all purposes. On the other hand, if, as the appellants claim, there is a public right of way down to the sea which has been used in connection with fishing and navigation, it may be contended that the public have a further and ancillary right to go from the end of the way over the foreshore as the tide recedes in order to fish, or to land or embark goods, fish, or passengers. In *Brinckman* v. *Matley* (1) Buckley J. thus expresses his opinion: "By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purposes of navigation and have, prima facie, a common of fishery there, and they have the same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. But when the sea recedes and the foreshore becomes dry there is not, as I understand the law, any general common law right in the public to pass over the foreshore. There are certain limited rights, and the fact that such limited rights exist goes to show that there cannot be a general right. For purposes of navigation there exists a common law right to cross the foreshore in case of peril or necessity. For the purpose of exercising the right of fishing it may be that there is—I do not say that there is—a right to cross the foreshore in order to launch a boat. In Brooke's Abridgment, tit. Customs, pl. 46, all the judges agreed 'that fishermen may justify going on the land adjoining the sea to fish in the sea, for this is for the good of the Commonwealth, affording sustenance to many persons, and is the common law.' The right of navigation, it has been said, is for the general benefit of all the kingdom, and the right of fishing tends to the sustenance and beneficial enjoyment of individuals, and for these purposes it would seem that there are special rights to cross the foreshore." I find nothing inconsistent with these words in the judgments of the Court of Appeal. Again, in *Behrens* v. *Richards* (2) the same judge seems to recognize that there might be, both in fact and in law, a public right of access to the foreshore for fishing. Such a right, if it exists, would make more obvious the conclusion that the end of the way where, at the verge of the respondent's land, it abuts on the sea at high water is a terminus ad quem, but I do not think that it is necessary to discuss this question here, because it seems to me sufficient in law that the way claimed is a way ending at the sea, which has been recognized in the case cited above as a good terminus of a public way. On any other view the sea could never be such a terminus.

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(1) [1904] 2 Ch. 313, 315.

(2) [1905] 2 Ch. 614, 623.

I think that because these questions of law are so fundamental in the case it should be sent back to the county court judge to reconsider. It is unfortunate, in any event, that such differences should be pursued so far, since I cannot find that the plaintiff has been in any way prejudiced by what has been done, or that the public have been in any way abusing what they conceive to be their rights. I desire respectfully to add my agreement with what was said by Buckley J. in *Behrens* v. *Richards* (1) to the effect that in those cases it ought not to be a matter of course to grant an injunction.

The result is that the case will be remitted to the judge for him to reconsider it on the material already before him, but with regard to the principles of law which this Court think should guide him. This does not mean that either party will be entitled to call further evidence.

SLESSER L.J. On June 7, 1933, the defendants broke open certain locked gates which the plaintiff, who is the owner in fee simple of land called Penrhyn Du, had caused to be placed across two footpaths. In consequence of this act the plaintiff claimed damages for trespass, and an injunction to restrain the defendants from continuing their trespass. The defendants endeavoured to justify their trespass by pleading that there were of right common and public highways over the plaintiff's land for all persons to go and return on foot of their free will and pleasure, and that the

(1) [1905] 2 Ch. 614.

plaintiff had wrongfully obstructed the highways by gates, wires, and fences. Alternatively, the defendants pleaded that there was a lawful and valid custom for the public or inhabitants of the parish of Llanengan, in which the alleged highways are, to use the ways claimed. The latter plea has been negatived, and is not now a subject of appeal.

The ways claimed were over defined ways, the one for embarking or landing at Porth Bach Cove, the other for embarking or landing on the rocks at, or adjacent to, Penrhyn Du Point, which is also on the sea. By further particulars the defendants designated the highways as going over a certain gate marked A from a highway, and through another gate to, or near to, the cove known as Porth Bach, and the other over a gate marked B also from a highway by a way parallel to, or approximately parallel to, the high-water mark, at ordinary tides, to, or near to, a lifeboat house shown on the map, both as indicated on the map annexed to the pleadings.

The learned judge has found as a fact that five different classes of people had, during the last sixty years or more, used the ways, namely :—

(1.) Sailors in vessels riding in the St. Tudwal's Roads, who rowed to, and landed upon, Penrhyn Du, or Porth Bach, for the purpose of buying ashore potatoes, and other things. (2.) Tenants of grazing land at St. Tudwal's Islands who used to embark and land at both points (though there was evidence that some had also embarked and landed at Abersoch and Pwllheli) for the purpose of landing or shipping sheep. (3.) Mariners yachting off the coast who rowed to, and landed, chiefly, at Porth Bach. (4.) Summer visitors to Abersoch who used the path for the purpose of bathing and paddling, and fishing, at both points. (5.) Some local fishermen who caught lobsters, and placed their catch in a lobster pot at Porth Bach, and then carted them along the path to gate A. He says that there was no wide difference between the evidence called for the defendants and the plaintiff, and cites in particular two witnesses, one of whom had known mariners use both points for landing in bad weather for forty-seven years, and the other who said that he had known the locality

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for thirty years, and testified that he had known the five classes of people above mentioned use the paths.

In the present case it is not suggested that there is any direct evidence of dedication, and if dedication is to be found it must be a matter of inference. For if the acts of user went on for a great length of time it must be presumed that the owner has been made aware of them: per Lord Denman C.J. in *Davies* v. *Stephens*. (1) Such a knowledge of the owner's intention is, of course, primarily a question of fact, and the weight to be attached to the evidence of user depends upon a number of circumstances of which the length of such user is important. Having set out the instances of user which I have cited, the learned judge appears to come to a conclusion against the inference of dedication primarily on the ground that as far back as living memory goes, down to 1908, there was no person in possession of the freehold capable of dedicating it away to the user of the public. He says that: "Long user of a way such as has been shown in this case, is inferential evidence from which a jury can conclude such dedication, but this, again, is subject to its limitations. Such intention can be inferred only against a person in possession of the land who was, at all material times, in a position to make an effective dedication." I regard this finding as meaning that but for the incapacity to make an effective dedication, the learned judge might have inferred dedication from the long user, but that finding dedication impossible he does not decide it.

I pass, therefore, at once to the objection of the learned judge that there was, at material times, no person capable of making an effective dedication. This view is based upon the fact that by common agreement, from 1856 to 1908, the property was in strict settlement, and the occupier had never got a sufficient interest to make a dedication. If the learned judge, on uncontradicted user within living memory, were to assume dedication I see no reason why that dedication should be assumed necessarily to be after 1856. Rather would I rely upon the opinion of Sir Montague Smith in the Privy Council in *Turner* v. *Walsh*. (2) "You refer the whole of the user to a lawful origin rather than to a series of trespasses. . . . ." And a few lines earlier he said: "The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user." In such a case it is not necessary to inquire who the individual was from whom the dedication first proceeded: per Coleridge J. in *Reg.* v. *Petrie* (1), and as Crompton J. said: "When such user is proved, the onus lies on the person who seeks to deny the inference from such user to show negatively that the state of the title was such that that dedication was impossible, and that no one capable of dedicating existed." In my view the learned judge is in error in arbitrarily limiting his consideration of a possibility of dedication so as to be within the time of the strict settlement, and then in arguing therefrom, notwithstanding the evidence of long continued user, which it was open to him to have accepted, that there could be no such inferred dedication because of the strict settlement.

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(1) (1836) 7 C. & P. 570.

(2) (1881) 6 App. Cas. 636, 642.

The second ground on which the learned judge refused to consider the effect of the evidence derived from long continued user is that there were acts of interruption in the user, not in fact, but to be inferred from grants of leases inconsistent with the hypothesis of dedication. These were, first, a series of mining leases dating from 1846, and, secondly, a lease granted by Lord Penrhyn to the Royal National Lifeboat Institution in 1894. These affect the upper or Penrhyn Du way. As to the lower or Porth Bach way, the learned judge says that a fence put across the way in 1908 constituted an interruption of the way. As to the upper way, I have said that, in my view, there is no reason to assume that the dedication can only be referred back to 1856. I equally think that it cannot be referred necessarily back to 1846, the date of the first alleged interruption by a mining lease, nor is there to be derived therefrom any evidence of interruption. It is true that in 1846, the then landlord, The Marquis of Anglesey, granted

(1) (1855) 4 E. & B. 737, 745, 749.

a lease to a Mr. William Roberts of the mines at Penrhyn Du, which I will assume, though there is no direct evidence of it, comprised the lands over which the upper way to Penrhyn Du Point is now claimed. The lease grants ingress and egress with horses carts and carriages or otherwise to take draw and carry away the minerals and all other materials to and from the said mines and works and every or any of them from time to time when and as often as need shall require.

It also appears that in 1846 there was in existence a tramway constructed for the purpose of working copper and lead mines on the headland, and the learned judge appears to have assumed that this tramway was constructed in 1846 under the lease. I can find no reason for coming to this conclusion. The lease appears to assume the existence of mines at Penrhyn Du in 1846, and, according to Pennant's Tours in Wales written in 1773, at that time there had been considerable adventures for lead ore and of late years attempts had been made to drain the mines by means of a fire engine.

According to *Duke of Beaufort* v. *Bates* (1) a tenant cannot where a right of way is granted make or use a " tramway or roadway." See also *Bidder* v. *North Staffordshire Ry. Co.* (2) And if any presumption is to be made, the language of the lease would point rather to the mines and tramway then existing; but however this may be, I differ from the learned judge in finding anything inconsistent in the grant of a carriage or tram way to the lessees of the mines and the inferred dedication of the lesser right of a pathway to the public.

The latter observation applies to the lease to the Lifeboat Institution in 1894. Such a lease granted to the Institution a parcel of ground on which to build a boat house and slipway together with a right of way thereto over and along the road leading to Abersoch. Now it is not disputed that the road to Abersoch beyond the gate (A) eastwards is a public highway, and it is interesting to note that in that lease no distinction is made between the parts of the road to Abersoch which are one side, or the other side of gate (B). The physical

(1) (1862) 3 De G. F. & J. 381, 392.

(2) (1878) 4 Q. B. D. 412, 429.

road, whatever its legal condition may be, ends above the life-boat house and appears as one continuous way cut out of the rock.

As regards the lower way and the fence placed upon the road in 1908, the evidence is that this was there placed for the purpose of preventing the straying of cattle. The placing of a bar across a way is not conclusive, as it may be referred to the need of keeping cattle from straying. I do not think it is possible to look upon the erection of the fence in 1908 in the circumstances in which it was erected, particularly as it did not prevent a deviation through a gate (C), as conclusive evidence to rebut the presumption which might otherwise be raised by the user: see *Dawes* v. *Hawkins.* (1) In the case of this lower path, a map dating from the time of the Napoleonic Wars shows this way as a road. The map was one prepared expressly for the purpose of military defence, and therefore, unlike a tithe map, is one in which roads would be very important. The map is dated 1795, though it is fair to say that it does not show the upper or Penrhyn Du road, but if this road was made subsequently for the purpose of mining, that is perhaps not surprising. In my view, the learned judge was wrong in thinking that there was any necessary evidence of interruption to justify or rebut the presumption from user which he otherwise might have drawn for the reasons above stated.

I would summarize the law on this matter by quoting a passage from Romer J., as he then was, in *Stoney* v. *Eastbourne Rural District Council* (2) (which was approved in the Court of Appeal) as follows: "As pointed out by Buckley J. in *Attorney-General* v. *Esher Linoleum Co.* (3), it is dedication and not user that constitutes a highway. User is merely the evidence that proves the dedication. Where the only user shown is user over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began. But where, as here, the user took place over

(1) (1860) 8 C. B. (N. S.) 848.
(2) [1927] 1 Ch. 367, 378.
(3) [1901] 2 Ch. 647.

the whole period covered by living memory, such user is just as good evidence of a dedication made a hundred years before the first proved act of user as of one made contemporaneously with that act. And this seems to be in accordance with numerous authorities of which only one need be mentioned. In *Winterbottom* v. *Lord Derby* (1) evidence was given of acts of user of a way extending over nearly seventy years; but during the whole period the land crossed by the way had been in lease. The jury were, however, directed that from long continued user going back as far as living memory could go they were at liberty to presume a dedication of a way to the public at a time anterior to the land being leased; and the Court of Exchequer held that this was a proper direction." I emphasize the words "at liberty."

I have yet to deal with the further difficulty of the learned judge that these rights of way have no termini, which he conceives to be fatal to the claims.

He says that the alleged footpaths terminate in the edge of the cliffs, but as I read the claim and particulars, it is a claim to highways to or near to the cove known as Porth Bach and to or near to the life-boat house. These are claims to the high-water mark and no further; they do not in my view include any claim over the foreshore. In *Davies* v. *Stephens* (2) Lord Denman left the case to the jury where the way claimed was a footpath from a public parish road down to the sea. I do not read Buckley J. in *Behrens* v. *Richards* (3) to be hostile to the view that there may, in appropriate cases, be such a terminus.

The well known cases of *Blundell* v. *Catterall* (4) and *Brinckman* v. *Matley* (5) do not seem to me to affect the argument that there may be a terminus of a way at high-water mark because the sea is a highway. They were primarily concerned with the right to the foreshore.

Another way in which the case can be put, which has not, I think, been considered sufficiently by the learned judge, is that on his finding of user by summer visitors to and from Abersoch, in the language of Atkin L.J. in *Moser* v. *Ambleside Urban District Council* (1): "I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway." The Master of the Rolls in the same case says that he finds it difficult to accept that you must find a right of way from one public place to another public place and that you cannot have a right of way to something like a cul-de-sac unless it be in a town. He says: "It seems to me that there may be a number of cases in which the public have a need to go to a particular point and there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the terminus ad quem to which the right of access is granted."

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(1) (1867) L. R. 2 Ex. 316.

(2) 7 C. & P. 570.

(3) [1905] 2 Ch. 614, 623.

(4) 5 B. & Ald. 268.

(5) [1904] 2 Ch. 313.

Finally, therefore, I am in agreement with my Lord that this case should be remitted to the learned county court judge on the terms stated by him. It is for the county court judge, upon the principles stated in the judgment of this Court, to ascertain as a fact whether, on the evidence of long-continued user, he would presume a dedication of a highway. It is because, in my opinion, his judgment has been affected by considerations some of which I think are erroneous and because he has failed to consider the evidence as to user in respect of periods of time which he should not have excluded from his consideration, that I cannot accept his present finding of fact as conclusive in law. At the same time I would emphasize that the presumption of dedication from user is a presumption of fact, and it does not necessarily follow that the learned judge is bound to find dedication even if there is no contradictory evidence. In the language of Lord Atkinson in *Folkestone Corporation* v. *Brockman* (2): "uninterrupted user of a road justifies a presumption in favour of the original animus dedicandi even against the Crown. That is a wholly different thing from saying that this presumption is a praesumptio juris, which, if unrebutted, must be acted upon

(1) 89 J. P. 118, 119, 120.

(2) [1914] A. C. 338, 355, 368.

by exclusive judges of facts." And, in the words of Lord Kinnear: "It then becomes a question for the judges of fact whether the user which may have been proved is to be accounted for by presuming dedication, or whether some other conjecture may not be the more probable."

TALBOT J. In this case the plaintiff sues the defendants for trespass on his land. The defendants pleaded that the places where they are alleged to have trespassed are public highways or alternatively ways which they are entitled to use under a custom. The latter plea, based on an alleged custom, is now abandoned.

There is no dispute as to the plaintiff's title nor that what the defendants have done upon his land, unless it can be justified as alleged, gives him a good cause of action. The only issue, therefore, is whether the places in question are public highways and it is, of course, for the defendants to prove that they are. Apart from prescription and statute, dedication by the owner of the land for public use is the only mode by which a highway can be created; and when that is relied on, both dedication and user must be proved: dedication to prove the will of the owner that the public shall use it, and user to prove acceptance by the public of the concession: see *Cubitt* v. *Maxse* (1), and particularly the judgment of Brett J. But also, in the great majority of cases, as in the case before us, user by the public is the only evidence of dedication which can be obtained. This is the ground of the statement by Lord Blackburn in *Mann* v. *Brodie* (2): "It is therefore, I may say, in England never practically necessary to rely on prescription to establish a public way."

The learned judge who tried the case without a jury was not satisfied that the defendants had proved such user as to establish dedication. The first, and in my view the fundamental, question is whether this Court has any right to interfere with this finding. If it stands as a decision of fact there is an end of the case. The law as to proof of dedication by user is, in my opinion, clear and is declared by authority which binds this Court. It is stated summarily by Parke B. in *Poole* v. *Huskinson* (1) in words which have been again and again approved. He says: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence, and no more." This is quoted by Lord Blackburn in *Mann* v. *Brodie* (2) as a correct statement of the law of England, and he adds: "But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was." What is the effect of this? If user is evidence from which dedication may be inferred but is not conclusive evidence of it, it must be for the jury or other tribunal of fact to say in each case whether in their opinion it is sufficient. That the question whether there has been dedication is a question of fact is obvious. If authority were needed it is to be found in the first words of Lord Dunedin's judgment in *Rowley* v. *Tottenham Urban District Council.* (3) A very important case on this matter is *Folkestone Corporation* v. *Brockman.* (4) The first paragraph of the headnote correctly represents the effect of Lord Atkinson's judgment and of the decision of the House: "Proof of long, continuous, and uninterrupted user of a way by the public, though it is evidence from which dedication may be inferred, does not create a praesumptio juris in favour of dedication which, unless rebutted, must prevail." I will read a passage which shows, among other things, that the contention which the House of Lords rejected in that case closely resembled the argument for the appellants in the present case. If I did not misunderstand him, counsel for the

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(1) (1873) L. R. 8 C. P. 704, 714, 715.

2) (1885) 10 App. Cas. 378, 386.

(1) 11 M. & W. 827, 830.
(2) 10 App. Cas. 378, 386.
(3) [1914] A. C. 95, 99.
(4) [1914] A. C. 338, 361.

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appellants argued that the evidence as to user for sixty years or more was such that in the absence of anything to contradict or countervail it the judge was not merely entitled but in law bound to find that the ways in question had been, before those acts of the defendants which are complained of, dedicated as highways. This argument will, in my opinion, be seen by any one who reads the judgments in *Folkestone Corporation* v. *Brockman* (1) to be directly contrary to that authority. It may perhaps be that there are passages in some earlier cases which might seem to support the argument, but it will be seen, I think, that at any rate in the great majority of instances this is a misunderstanding, because the Court was considering what the jury or other tribunal of fact was entitled on the evidence to find and was not suggesting that they were obliged to find it. The question in the *Folkestone* case (1) was whether a particular street had been dedicated as a public highway. The justices, having declined to find that it had, an appeal was dismissed by the King's Bench Division, but the Court of Appeal by a majority reversed the judgment of the Divisional Court and set aside the justices' decision. The House of Lords held that neither the Divisional Court nor the Court of Appeal had any right to interfere with the decision of the justices, the tribunal appointed to determine the question of fact, and accordingly reversed the judgment of the Court of Appeal and restored the order of the King's Bench Division. Lord Atkinson said in the course of his judgment: "It would appear . . . . that the line of reasoning adopted by counsel for the respondents in their argument before your Lordships was in the Court of Appeal only too successful. It was, as I understood it, to this effect: 'Proof of open, uninterrupted, and continuous user raises a praesumptio juris in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail. Tribunals which are exclusive judges of fact, whether juries or justices, are bound in law to act upon it, and their finding against it is an error in law. In the present case there was such evidence of user, no rebutting evidence was produced, the justices were

(1) [1914] A. C. 338, 361.

therefore bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law.' " That is Lord Atkinson's summary of the argument addressed to the House in the *Folkestone* case. (1) He goes on in his own words : " What the justices have really and in fact done is not to find a negative without any evidence to support it, but they have refused, on the evidence laid before them, to find the affirmative proposition contended for by the respondents that the owner . . . . had intended to dedicate, and had dedicated, this footway to the public. The existence of this intention, which is crucial in such matters, being an inference of fact, the justices were clearly within their right in so refusing, unless it be the law that in such cases where open, long-continued, and uninterrupted evidence of user is clear, unrebutted, and unexplained, the tribunal whose members are the exclusive judges of issues of fact are bound in law to draw this affirmative inference, and consequently that in every case where the question of the dedication to the public of a highway is tried before a judge and jury, and strong evidence is given of user by the public, while no evidence rebutting the so-called praesumptio juris thereupon arising is produced, the litigant relying upon dedication must necessarily be entitled to have a verdict directed for him. During the argument, in order to test the soundness of this line of reasoning, I asked to be referred to any case where in a trial before a judge and jury a verdict was directed under such circumstances. No such authority was produced. I believe it would have been produced had it existed. I think it does not exist. On the contrary, the invariable well-established practice, followed by many of the most able and distinguished judges for many, many years, has, I think, been, no matter how strong the evidence of user, to leave all the evidence to the jury, to ask them to consider it as a whole, and determine whether the owner of the soil intended to dedicate to the public a highway over it." Then he deals with the special position of the justices, which I need not read, and he

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(1) [1914] A. C. 361, 362.

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goes on: "I am unable, therefore, to discover on what principle their decision can be set aside as contrary to law because they have refused to find in a way in which a jury in a similar case would not have been directed to find or be bound to find. I propose, therefore, to test the soundness of the reasoning upon which the Court of Appeal have apparently acted by reference to the procedure followed on the trial of questions such as this before a judge and jury, and as the point is of general importance, one may be excused for dealing at some length with a few of the best-known authorities." Then he quotes the passage from *Poole* v. *Huskinson* (1) that I have already read and also the passage from Lord Blackburn (2) commenting upon it. There is another short passage in the same judgment of Lord Atkinson's (3): "Your Lordships have not been referred to any case, and I, though I have searched somewhat diligently, have not been able to find any case, in which there was even a suggestion that, when the evidence of user is of the strongest kind and is not rebutted, the judge is entitled to direct the jury to find a verdict in favour of dedication. The crucial matter being the existence in the mind of the owner of an intention to dedicate, the inference of that fact, if drawn at all, must be drawn by the judges of fact. The respective functions of the judge and jury in such cases are, in my view, this. It is for the judge in each case to determine, as a matter of law, whether there is any evidence from which the inference of an intention to dedicate can reasonably be drawn; it is for the jury to determine whether it shall be drawn. And if, by adopting such a rule or formula as that contended for, a judge takes upon himself to decide upon the question whether the alleged presumption is rebutted or no, and forces this conclusion of his own upon the tribunal which is to determine issues of fact, either by directing them to find in a certain way, or by setting aside their decision if they find in the contrary way, he, in my view, usurps an authority which in no way belongs to him. The rule of law as to the action of justices in such cases as this is, I think, this, that if it does not appear on the face of their proceeding that they have, as it is said, misdirected themselves, and there was evidence before them upon which reasonable men might act to sustain their findings of fact, their decisions cannot be disturbed. An order made without any evidence to support it is in truth, in my view, made without jurisdiction, and is therefore invalid at law, but a refusal to find an affirmative in favour of the person on whom the burden of proof lies cannot be so treated. It does not come within either the letter or spirit of the above-mentioned rule." The other judgments are all to the same effect. Lord Kinnear (1) refers to the judgment of Parke B. in *Poole* v. *Huskinson* (2) and to the comment upon it made by Lord Blackburn. (3) His judgment, I think, follows exactly in substance the judgment of Lord Atkinson. I do not think that I need read it, although, if I may venture to say so, it is very forcibly put. Lord Dunedin deals with the matter at somewhat greater length. He says that when that case came before the Court of Appeal, two of the judges in the Court of Appeal took the view that there was no evidence upon which the finding of the justices could be supported; Fletcher Moulton L.J. dissented. Lord Dunedin said (1): "My Lords, I am not going to recite the judgments of the majority, but I hope I do them no injustice when I say that they seem to me to be rested on this view. They fasten upon certain of the series of separate conclusions in fact which the justices set out in the case." Then he quotes those and he goes on: "These findings, say they, amount to a finding of user by the public. User by the public raises a presumption of dedication, and in the other facts found by the justices . . . . there is nothing sufficient to rebut the presumption. With deference to the learned judges, I do not think that is the proper way to approach the question, and its defect, to my mind, consists in regarding 'user' as an inflexible term, which, if found to apply, can lead to only one legal result. User is evidence, and can be no more, of dedication. The expression that user raises a presumption

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(1) 11 M. & W. 827, 830.
(2) 10 App. Cas. 378, 386.
(3) [1914] A. C. 338, 367.

(1) [1914] A. C. 338, 352, 374. (2) 11 M. & W. 827, 830.
(3) 10 App. Cas. 378, 386.

of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter for inquiry, what was the user, and to what did it point. And this must be considered, not . . . . by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication." Lord Loreburn seems to have had some doubt as to the effect of the justices' findings in this case, but the decision of the majority is, of course, the decision of the House and it binds this Court.

Many other authorities might be cited, but it will be enough to add one. In *Attorney-General* v. *Manchester Corporation* (1) Maugham J., then a judge of the Chancery Division, said this: "There is now no doubt as to the legal position in relation to the acquirement of a public right of way. The House of Lords in *Folkestone Corporation* v. *Brockman* (2) clearly laid down that notwithstanding a long continuous user of a road by foot passengers, indeed, for upwards of eighty years without interruption, it was yet necessary to establish that there was an intention to dedicate, an animus dedicandi, and that the user by the public was evidence of such animus and no more. Their Lordships accepted the dictum of Parke B. in *Poole* v. *Huskinson* (3)," and then he reads that.

I think that I have said enough to show that it would be impossible for this Court, without infringing principles of law which have been now at any rate established beyond doubt, to hold that the learned county court judge has come to a conclusion of fact on the question whether these highways are highways to which he had no right to come; but I think, as our attention has been called to *Behrens* v.

(1) [1931] 1 Ch. 254, 268.
(2) [1914] A. C. 338.
(3) 11 M. & W. 827, 830.

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Richards (1), it is right to say a word as to the remarkable likeness of the facts there to those of the case before us and to refer to one or two passages in Buckley J.'s judgment. For example, he says: "To those who are conversant with the Cornish coast or with many other parts of the coast in this country it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for very many years. From this fact alone it is difficult in surroundings such as there are in this case to infer an intention to dedicate." On the next page he says: "The parish roads (as is common in many parts of Cornwall) are in this neighbourhood joined by rough cart-tracks coming up from the irregular contour of the broken coast line, which serve to give access to the foreshore or the lands adjoining the foreshore; and these rough cart-tracks in turn degenerate into mere rough foot-tracks crossing the moorland and ending sometimes in the roughest of paths by which the adventurous may scramble down the face of the cliff to the sea. From the mere fact that the landowner has never raised objection to any one who was so minded making use of tracks such as these no inference of dedication can, I think, be drawn." There are, of course, special circumstances in each case, and moreover a decision of fact in one case cannot bind a judge who has to decide a similar question of fact in another; but I think a reading of *Behrens* v. *Richards* (1) will show that even if we had power to review the decisions of fact of the learned judge in this case, as in my opinion we have not, it would be very difficult indeed to say that it is inconsistent with the evidence. I need scarcely add that, as has been already said, the restriction on the power of this Court to interfere with decisions of county courts on questions of fact is imposed by express legislation and is not merely derived from the common law.

If, therefore, the learned judge had simply decided as a matter of fact that there is no evidence of user as of right sufficient to satisfy him that there had been dedication of

(1) [1905] 2 Ch. 614, 619, 620.

the ways alleged by the defendants, that would dispose of this case; but he went on to state other grounds for saying that the defendants' case cannot be supported. These are certainly, with all respect to him, not satisfactorily stated, and indeed probably involve errors of law. If his decision depends on these, we ought no doubt to set aside his judgment and order a new trial or a new hearing. I do not feel sure that he has not really decided for the plaintiff on a ground of fact with which we have no power to interfere, quite apart from these points to which I have just alluded, and if that were so, we ought not to put the parties to the expense of a further hearing because in addition to grounds which are sufficient and conclusive he has given others which are erroneous. But the other members of the Court are of opinion, and I do not dissent, that his judgment may have been materially influenced by erroneous views of the law, and if so, it is right (if the appellants wish it) to give him a further opportunity of considering his decision on the materials already before him in the light of the opinion of this Court.

Appeal allowed: case remitted to county court.

Solicitors for appellants: *Taylor, Jelf & Co., for Harward & Evers, Stourbridge.*

Solicitors for respondent: *Evan Davies & Co., for Evan R. Davies & Davies, Pwllheli.*

J. W. H.

GRAVESEND CORPORATION *v.* KENT COUNTY COUNCIL.

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ATTORNEY-GENERAL (ON THE RELATION OF THE KENT COUNTY COUNCIL) *v.* GRAVESEND CORPORATION.

[1932. G. No. 1806.]
[1933. A. No. 824.]

Education—Higher Education—Technical School—School Premises owned by Borough Council—Annual grants by County Council towards cost of building—Transfer of powers from Borough Council to County Council—Occupation of school premises by County Council as authority for higher education—Premises to be used exclusively for higher education—Right of Borough Council to charge rent—Technical Instruction Act, 1889 (52 *&* 53 *Vict. c.* 76), *ss.* 1, 4—*Local Taxation* (*Customs and Excise*) *Act,* 1890 (53 *&* 54 *Vict. c.* 60), *s.* 1—*Education Act,* 1902 (2 *Edw.* 7, *c.* 42), *ss.* 2, 3—*Education Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 51), *ss.* 70, 113, 114, 115.

By the Education Act, 1902, the duty of supplying higher education in a borough was transferred from the borough council to the county council. In pursuance of its duties as the authority for higher education in the borough, the county council occupied a technical school owned by the borough council. The school in question was built by the borough council when it was the local authority for higher education. Part of the cost of building the technical school was borne by the borough council, while the county council made a series of annual grants towards the cost. The borough council undertook that the school premises should be used exclusively for higher education. But since its powers in regard to higher education had been transferred to the county council, the borough council could no longer use the school for that purpose. The Education Act, 1902, contained no provisions dealing with the financial adjustments which became necessary in consequence of the transfer of powers from one local authority to another:—

Held, (1.) that there was nothing in the Education Acts to prohibit the county council from paying, or the Gravesend council from receiving, an economic rent in respect of the occupation of the school by the county council for higher education, and (2.) that the county council had no interest in the premises, except an equitable interest, which resulted from the grants which it had made towards the cost of the premises. In assessing the rent to be paid, allowance must be made for that equitable interest. The rent payable on that basis would be arrived at by arbitration, in the absence of agreement, and the arbitrator would proceed in the manner recognized as proper in valuing public buildings.

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TWO ACTIONS tried together without a jury.

Before 1902, the Gravesend council was the local authority for technical education in Gravesend, under the Technical Instruction Acts, 1889 and 1891 (52 & 53 Vict. c. 76 and 54 & 55 Vict. c. 4). The Gravesend Technical School was built by the borough council in about 1893. The cost of the building was partly paid by the borough council, partly by a grant from the Science and Art Department, now the Board of Education, and partly by a series of annual grants made by the Kent County Council, partly from the county rate and partly from the local taxation exchequer contribution account. In consideration of these grants the Gravesend council undertook that the school premises should be used exclusively for technical education within the meaning of the Technical Instruction Acts, 1889 and 1891, and on failure to observe that restriction the grants were to be repaid.

By the Education Act, 1902 (2 Edw. 7, c. 42), the Kent County Council became the authority for higher education at Gravesend, and occupied the Gravesend Technical School, which was the property of the Gravesend council, for purposes of technical education. The Kent County Council continued to make grants towards the cost of the school premises until 1931. Under an agreement dated June 8, 1910, the Gravesend council let the premises to the Kent County Council on a yearly tenancy from August 1, 1908, at a rent of 10s. a year, subject to three months' notice to terminate the tenancy. The county council were to pay all rates, taxes, teachers' salaries and other expenses. They were to occupy the premises exclusively for higher education. This agreement was terminated by notice on April 27, 1915; but it was renewed from time to time for various periods until the final notice to quit was given in June, 1930.

Two actions were subsequently brought. In the first action the Gravesend council claimed to recover possession of certain premises, of which they were the owners in fee simple, from the county council as tenants, who had been given notice to quit. In the second action the Attorney-General, on the relation of the Kent County Council, claimed an injunction to restrain the Gravesend council from claiming to eject the Kent County Council from the premises.

S. G. Turner K.C. and *S. M. Noakes* for the Gravesend council. By the Education Act, 1902, the supply of higher education in Gravesend was transferred from the Gravesend council to the Kent County Council, but that Act made no provision for the financial adjustments which were inevitable when these functions were transferred to the county council. The Gravesend council are in possession of the premises as landlords, and the Kent County Council occupy them as tenants to the Gravesend council. There is nothing in the Education Acts to prohibit the county council from paying, or the Gravesend council from receiving, an economic rent in respect of the occupation of the school premises by the county council. Moreover, the Gravesend council is under no obligation, statutory or otherwise, to permit the county council to occupy the school premises for higher education without paying an economic rent therefor.

R. M. Montgomery K.C. and *R. J. Sutcliffe* for the Kent County Council. The Gravesend council has no right to prevent the user of the premises by the county council for the purposes of higher education. Further, it has no right to charge for the user of the premises for higher education. It has no power to sell or to let the premises. There may well be a power in the county council to pay a rent, but the Gravesend council has no power to charge a rent and may not have any power to accept any rent.

S. G. Turner K.C. in reply. Rights cannot be taken away from any person or body except by clear words in the statute. If the Gravesend council had power to charge a rent before the statute was passed, that power still remains, in the absence of clear words depriving the council of it. The only interest the county council have in the premises is an equitable one limited to the amount of their contributions towards the cost.

Cur. adv. vult.

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1934. Oct. 31. LORD WRIGHT (sitting as an additional judge of the King's Bench Division) read the following judgment: These are two actions which have been tried together. The plaintiffs in the former are the borough council of Gravesend (whom I shall call "the Gravesend council") and the defendants are the Kent County Council (whom I shall call "the county council"). In the first action, the Gravesend council are claiming possession of certain premises, of which they are owners in fee simple, from the county council as tenants, who have been given notice to quit. The county council defend on the ground that the premises are dedicated to higher education in Gravesend, and that they occupy them under the Education Acts as the local authority for higher education in Gravesend. In the second action, the plaintiff is the Attorney-General, on relation of the county council, and the claim is for an injunction to restrain the Gravesend council from claiming to eject them from the premises.

This being, broadly stated, the purport of the pleadings, it appeared, as the hearing proceeded, that the real dispute between the two public bodies was whether the county council were entitled under the Education Acts to occupy the premises, without paying other than a nominal rent, and if a rent is payable, how is it to be ascertained.

At the end of the case I gave leave to the Gravesend council to embody these issues in an amendment, and a declaration is thus claimed in the following terms: (1.) That the plaintiffs are under no obligation to allow the county council to use the premises for higher education without payment of rent. (2.) That the defendants have no interest in the premises, except an equitable interest, in the proportion that their contributions (other than moneys from the Exchequer Contribution Account) towards its cost bear to the total cost, including interest on loan.

The premises in question are the Gravesend Technical School, which was provided by the Gravesend council in about the year 1893. That council was at that date the local authority for technical education in Gravesend, under the Technical Instruction Acts, 1889 and 1891. By s. 1, sub-s. 1, of the Act of 1889 it is provided as follows: "A local authority may from time to time out of the local rate supply or aid the supply of technical or manual instruction, to such extent and on such terms as the authority think expedient, subject to the following restrictions," and of these restrictions I need only refer to one: "(*g*) The amount of the rate to be raised in any one year by a local authority for the purposes of this Act shall not exceed the sum of one penny in the pound"; and then I may refer to s. 4, sub-s. 1: "For the purposes of this Act the expression 'local authority' shall mean the council of any county or borough, and any urban sanitary authority within the meaning of the Public Health Acts. (2.) The local rate for the purposes of this Act shall be—(*a*) In the case of a county council, the county fund; (*b*) In the case of a borough council, the borough fund or borough rate." Then it goes on to deal with the urban sanitary authority, and in sub-s. 3 it says: "A county council may charge any expenses incurred by them under this Act on any part of their county for the requirements of which such expenses have been incurred"; and by sub-s. 4: "A local authority may borrow for the purposes of this Act . . . . (*b*) In the case of a borough council, as if the purposes of this Act were purposes for which they are authorised by section one hundred and six of the Municipal Corporations Act, 1882, to borrow."

Under these provisions the Gravesend council raised part of the funds to build the Technical School by borrowing. They also obtained a grant of 1000*l*. from the Science and Art Department, now the Board of Education, under a deed dated January 24, 1894; and they also obtained grants from the county council.

In 1902 the Education Act of that year (2 Edw. 7, c. 42) was passed. Its main effect in regard to higher education was set out in s. 2, which was in the following terms: "(1.) The local education authority shall consider the educational needs of their area and take such steps as seem to them desirable, after consultation with the Board of Education, to supply or aid the supply of education other than elementary, and to promote the general co-ordination of all forms of education, and for that purpose shall apply all or so much as they deem necessary of the residue under section one of the Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60), and shall carry forward for the like purpose any balance thereof which may remain unexpended, and may spend such further sums as they think fit: Provided that the amount raised by the council of a county for the purpose in any year out of rates under this Act shall not exceed the amount which would be produced by a rate of twopence in the pound, or such higher rate as the county council, with the consent of the Local Government Board, may fix. (2.) A council, in exercising their powers under this Part of this Act, shall have regard to any existing supply of efficient schools or colleges, and to any steps already taken for the purposes of higher education under the Technical Instruction Acts, 1889 and 1891." But s. 3 also gave a non-county borough power to supply or aid the supply of higher education. That section is as follows: "The council of any non-county borough or urban district shall have power, as well as the county council, to spend such sums as they think fit for the purpose of supplying or aiding the supply of education other than elementary: Provided that the amount raised by the council of a non-county borough or urban district for the purpose in any year out of rates under this Act shall not exceed the amount which would be produced by a rate of one penny in the pound." I may add a reference to s. 1, sub-s. 1, of the Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60), which provides that: "Out of the English share of the local taxation (customs and excise) duties paid to the local taxation account on account of any financial year—(*a*) The sum of 300,000*l*. shall be applied for such purposes of police superannuation in England as hereinafter mentioned; (*b*) The residue shall, unless Parliament otherwise determines, be distributed between county and county borough funds, and carried to the Exchequer contribution accounts of those funds respectively, and applied under the Local Government Act, 1888, as if it were part of the English share of the local taxation probate duty, and shall be the subject of an adjustment between counties and county boroughs, according to section thirty-two of the said Act" ; and then by sub-s. 2: "The council of any such county or county borough may contribute any sum received by such council in respect of the residue under this section, or any part of that sum, for the purposes of technical education within the meaning of the Technical Instruction Act, 1889, and may make that contribution over and above any sum that may be raised by rate under that Act."

The result of the Act of 1902 was that the supply of higher education in Gravesend was taken over from the Gravesend council and transferred to the county council, who accordingly, in accordance with s. 2, sub-s. 2, of the Act, entered into occupation of the premises as being an efficient school. They have so continued, and now occupy under the consolidating Education Act of 1921 (11 & 12 Geo. 5, c. 51).

In the period before the Act of 1902 the county council made large contributions to the cost of the premises in question, and continued to do so until 1931, when the loan, which had been obtained by the Gravesend council, was finally discharged. A list of the total contributions year by year from 1891 to 1931 has been agreed, and shows a total of 17,063*l.* 6*s.* 1*d.* These are thus summarized: "1892 to 1904, to capital expenditure on Technical School, 2453*l.* 14*s.* 5*d.*; to general current expenses (including loan charges) of the higher education service, 9859*l.* 16*s.* 5*d.*," and then: "1904 to 1932, to interest and repayment of loans in respect of the Technical School, 4749*l.* 15*s.* 3*d.*" I was, however, informed that of this figure of 9859*l.* 16*s.* 5*d.* only 4624*l.* was in repayment of the loan and interest. If that is correct, the total contribution over these years to the cost of the building by the county council was about 12,000*l.*, but it is not necessary here to define the exact figure. The total outlay on the building was, if interest on the loan be included, 24,418*l.*

In the case of every payment made in this way by the county council to the Gravesend council, a receipt in due form was taken by the former from the latter in the same

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terms on every occasion. What is relevant in this case is the final paragraph, which was in these terms—it is a covenant by the Gravesend council: " that any building to be erected or acquired or partly erected or acquired by means of the said sum, or by means of any loan in the discharge of the principal and interest of which or any part thereof respectively, the said sum of 501*l.* 7*s.* 11*d.* or any part thereof shall be applied, shall be exclusively used for purposes of technical education within the true intent and meaning of the said Technical Instruction Acts, 1889 and 1891, and upon any failure in the observance of this restriction the said sum of 501*l.* 7*s.* 11*d.* shall be repaid by the said town council to the said Kent County Council upon demand made."

In respect of the grant of 1000*l.* from the Science and Art Department, a deed was executed by the Gravesend council which contained a similar covenant that " if at any time thereafter the said buildings to be used as schools of science and art as aforesaid shall be appropriated to any uses other than those of schools of science and art the said grant of 1000*l.* which has been made by the Department as aforesaid, shall be forthwith repaid by the council to the Lords of Her Majesty's Treasury."

The fee simple of the premises is in the Gravesend council. The county council having thus come into occupation of the premises, an agreement was concluded on June 8, 1910, between them and the Gravesend Corporation, whereby the latter let to the former the premises as on a yearly tenancy from August 1, 1908, at a rent of 10*s.* a year subject to three months' notice. The county council were to pay all rates and taxes and repair and insure the premises. They were only to occupy the premises for the purpose of higher education, and to pay teachers' salaries and other expenses. They were also in each year to pay a sum to make up the instalments of principal and interest due under the loan, so far as a rate of 1*d.* in the pound, which the Gravesend council were to raise, was insufficient for that purpose. The agreed statement above referred to shows that in each year from and including 1910 up to 1931 the amounts so paid came to 4749*l.* 15*s.* 3*d.*

in all and are described under the head of "loan charges." This agreement was terminated by notice on April 27, 1915, but it was renewed and it was continued either as for periods each of three years, or as a yearly tenancy until the final notice to quit was given in June, 1930.

The county council replied that, the premises being provided for higher education, their occupancy of them could not be terminated except on an order of the Board of Education allowing the Gravesend council to alienate the property, and that if it were necessary for them to find alternative accommodation the county council would have to consider whether they should recover the cost of such accommodation by special rate on the locality. Attempts were made to arrive at a compromise, but eventually the writs were issued in these actions.

The Gravesend council relied on the broad case that the premises were their property, and that there was nothing in the Education Acts which obliged them to allow the county council to occupy the premises without paying what was called an economic rent.

The county council contended that the premises had been constructed out of moneys provided for technical or higher education, and were dedicated to that use, and thus could only be occupied by the authority for higher education, which is the county council, who could thereby fulfil their statutory duties. They also relied on the provision in the Act debarring the Gravesend council from alienating the building without the consent of the Board of Education, which in fact had not even been applied for. They also contended that the Education Acts contained no power to the county council to pay a rent, nor to the Gravesend council to receive rent. If, however, any rent was payable other than a nominal rent, it could only be on the special basis applicable to public buildings, and based on so much of the outlays on the building as remained after deducting the amounts contributed as above stated by the county council. They further relied on the covenants which the Gravesend council had entered into, as stated above, in respect of each payment made to them by the county council, as a further ground disentitling the Gravesend council to divert the premises to any use other than that of higher education.

It is strange that the Education Act of 1902 contained no provision for the financial adjustments which were inevitable when the supply of higher education was transferred to the county council. Such provision has been made in other Acts, as, for instance, in s. 151 of the Local Government Act, 1933. Any such adjustment could deal with the transfer, not only of property, but of liabilities, and all other necessary matters. Some provisions of this character are indeed contained in the Fourth Schedule of the Education Act, 1921, and I shall now quote from the Consolidation Act; but that schedule was not relied on by either party as being relevant to the circumstances of the present case, and I do not further consider it here. Sect. 70, sub-s. 3, of the Education Act, 1921, which corresponds with s. 2, sub-s. 2, of the Act of 1902 quoted above, and which requires the county council to have regard to any existing efficient schools, clearly contemplates that the county council will, where necessary, avail itself of schools supplied under the Act of 1889 by a non-county borough council, such as the Gravesend council. Again, s. 114, which contemplates an appropriation of the land to purposes other than educational, is thus expressed and qualified: "The council of any county, borough, or urban district may, with the consent of the Board of Education, appropriate any land held by them in their capacity as local education authority for any of the purposes of the council, otherwise than in their capacity as local education authority approved by the Minister of Health." Sect. 115, sub-s. 2, thus deals with alienation: "A council shall have power, with the consent of and after inquiry by the Board of Education, to alienate any land acquired or held by them for the purposes of higher education under this Act or any enactment repealed by this Act, and, in the case of the sale of any such land, the proceeds of sale shall be applied in such manner as the Minister of Health may sanction towards the discharge of any loan of the council under this Act or any enactment repealed by this Act, or otherwise for any purpose for which capital may be applied by the council under this Act." Again, s. 113 deals with changes in the appropriation of the land to higher educational purposes from elementary purposes, or vice versa, or from other purposes to educational purposes, subject to the consent of the Board of Education, and in the last class to the consent of the Minister of Health; but in all these cases there is no transfer from one authority to another.

These sections all seem to show that lands once dedicated to educational purposes cannot be diverted to other uses except subject to conditions and to the sanctions of the central authority. They afford, however, no help in ascertaining what is to be the adjustment of rights or liabilities when a local authority is using for higher education a property owned by another local education authority, which that other had acquired for the purposes of higher education at a time when it was the authority for higher education, but which it can no longer use for this purpose, since its powers in that regard have been transferred to the former authority.

The problem can only be solved by the application of general principles of law. I shall assume for the moment that the cost of the Gravesend Technical School was wholly supplied out of the borough rates; that the Gravesend council owns the school in fee simple. It is true that it cannot (without the statutory sanction) use the building for any other purpose than higher education, and in order that it should be so used, it must now be occupied by the county council. All that seems to follow from the Act. But in my opinion there is no necessary connection between this state of things and the further position that the Gravesend council must give the use and occupation to the county council without being paid for it. So to hold would, I think, be to interfere with the Gravesend council's rights of property without any positive enactment to that effect and without justification in fairness. The Gravesend council have indeed a limited power to spend money up to a penny rate on higher education, but they are not bound to do so and are not seeking to do so. If they were bound without compensation to supply the use of these premises to the county council, they would to that extent be compelled to aid in the supply of higher education to the extent of the annual value of these premises, which I find contrary to the spirit of the enactment.

Nor can I see any ground for the contention that it is ultra vires either for the county council to pay a rent, or the Gravesend council to receive rent. The county council clearly are impliedly authorized to pay rent where legally necessary in order to supply higher education, and if in law they must pay rent to the Gravesend council for the school, it is no more ultra vires to do so than to pay any other necessary expenses. Equally, if the Gravesend council are entitled to be paid rent, they are as much entitled to receive it as to receive any other payment due to them. Whether when they receive it they are in law bound to apply it to purposes of education, elementary or higher, or are free to use it otherwise, and in any case whether any sanction of the Board of Education or the Minister of Health to any mode of employing the money is necessary, are not questions relevant between these parties and are not necessary to consider here. I can find no statutory prohibition in the Acts against the receipt of rent and no requirement of any sanction or approval of the central authority for that purpose.

I may add that between 1908 and 1931 the county council were content to accept the position that they were tenants of the Gravesend council with regard to these buildings, and to pay a rent, nominal it is true, but in all these years the county council were, in addition, paying substantial sums by way of grants in respect of the buildings. In that state of things, a merely nominal rent may well have seemed fair. Thus the actual quantum may be disregarded, but the principle that some rent was payable was admitted throughout these years.

But though in my judgment some rent is exigible by the Gravesend council, I think an important matter arises in regard to the amount. In my opinion, though the legal estate in the school is vested in the Gravesend council, the county council have an equitable estate or interest in it in the proportion that the total sums contributed by the county council bear to the total cost on the principles very simply and clearly stated by the Court of Appeal in the judgment of the Court delivered by Farwell L.J. in *The Venture*. (1) On this basis the full rent must be reduced in favour of the county council to the extent of this equitable interest or resulting trust pro tanto. That this is so was not really disputed by Mr. Turner on behalf of the Gravesend council, but he sought to quality that admission by urging that an inquiry should be held to ascertain how much of these contributions came from the county council's share of the residue of the local taxation exchequer contribution account, and how much from the county rate or similar sources. His submission was that, as regards the former, the county council could claim no equitable interest resulting from the payments, as they had acted simply as a channel in these matters for the disbursement of Government money. But, in my opinion, no such distinction should be drawn, all the payments made by the county council by way of grants being properly treated as on the same footing, and as equally creating the resulting trust which in principle has been admitted. As between these parties these moneys, whatever their origin, must be regarded as moneys of the county council. The earlier grants were made in terms as in exercise of the powers conferred on the county council under the Local Taxation (Customs and Excise) Act, 1890, which I have already read.

The Act of 1902 somewhat altered the county council's discretion in this respect by the words of s. 2, sub-s. 1: "and for that purpose"—that is for the purposes of higher education—"shall apply all or so much as they deem necessary of the residue under section one of the Local Taxation (Customs and Excise) Act, 1890, and shall carry forward for the like purpose any balance thereof which may remain unexpended, and may spend such further sums as they think fit." It is clear that since the Act of 1902 (because its provisions were reproduced in the Act of 1921) the county council's contribution might be

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(1) [1908] P. 218, 229.

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either from the Exchequer contribution account or from other funds. I have no evidence what source they came from, but even if all these moneys came from the county council's share in the residue of the Exchequer contribution account, and even if all the contributions before 1902 or 1904 came in whole from the Exchequer contribution account, all these moneys were in any case funds which became the funds of the county council, and were entrusted to the county council to distribute in any defined purpose at their discretion. It rested with the county council whether they should devote them to aid the Gravesend council or to some other object within the ambit of the county council's powers. I see no reason for drawing any such distinction as the Gravesend council suggests. In my judgment, the resulting trust in favour of the county council arises to the extent of the whole of their grants or contributions.

In my opinion, the declarations asked for in the amended statement of claim should be made, but with the following qualification: it should be declared (1.) that the plaintiffs are entitled to be paid a rent by the county council for the use of their premises for higher education; (2.) that the county council have no interest in the premises except an equitable interest in the proportion that their contributions towards its cost bear to the total cost, including interest on loans. The rent payable on this basis will be arrived at by an arbitrator if the parties do not agree, who will proceed in the manner which is recognized as proper in valuing public buildings such as these premises, which are appropriated to particular public uses.

I ought to add that two further questions have been raised on either side, which I do not think it necessary to discuss. The county council have urged that if they pay rent to the Gravesend council, the latter on receiving it must apply it to the purposes of higher education. The Gravesend council reply that it is for them to do what is proper in regard to the application of any moneys they receive, and if they fail that is not a matter which concerns the county council, but is for the proper authority. I think this is a correct answer.

On the other hand, the Gravesend council seek to secure an undertaking or declaration that if rent is paid to them the county council shall not seek to recoup themselves by a special charge on Gravesend under the powers given by s. 122, sub-s. 1 (*a*), of the Act of 1921. The county council reply that no such matter is relevant in this action, and it is for them to determine how they should use their discretion, subject to the terms of the Act, in what is purely a matter of administration. This also appears to me to be a correct answer.

I was referred to the concluding words of s. 171, sub-s. 2, of the Act of 1921, which are: "And the provisions of this Act shall apply with respect to any school, college, or hostel established, and to any obligation incurred, under the Technical Instruction Acts, 1889 and 1891, as if the school, college, or hostel had been established or the obligation incurred under Part VI. of this Act." But neither of the learned and experienced counsel pretended to be able to explain exactly what these words mean, and I am content to say that, whatever they mean, they do not mean that the county council are to enjoy these premises rent free.

I have, so far, not referred to the covenants taken by the county council from the Gravesend council in respect of each contribution, the terms of which have been already set out. These covenants, however, do not help to decide the question whether or not rent is payable as between these parties. No doubt the covenant would be material to consider if the Gravesend council were diverting the premises to any user contrary to the covenants, and a claim to repayment could, it seems, be enforced, and the Court might, in its discretion, grant an injunction in the terms of the covenant if that seemed a proper course in law on all the facts. But I do not believe that the Gravesend council have any idea or desire to divert the premises, though they have at times expressed that intention. Nor do I believe that they desire to obtain possession of the premises, as claimed in their action, which is in form based on the ordinary relationship between the parties of landlord and tenant. It is obvious that that

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is not a true conception of the position as a whole, both in view of the statutory conditions affecting both parties in regard to these premises, and also the covenants entered into by the Gravesend council.

I do not feel bound, as I have dealt with the real issue between the parties as defined in the amended statement of claim, to deal in detail with the unsubstantial issues raised in the actions as originally framed. I may simply say that in my discretion I should not, as at present advised, be disposed to make the declarations asked for in the action by the Attorney-General on the relation of the county council, or to grant the injunctions prayed in the action by the Gravesend council. I do not see how I can make an order for possession on the simple basis of landlord and tenant.

In my judgment the proper course is for the Court to make the two declarations as stated above.

Solicitors for the Gravesend Corporation: *Watkins, Pulleyn & Ellison, for the Town Clerk, Gravesend.*

Solicitors for the Kent County Council: *Church, Adams, Tatham & Co.*

T. W. M.

C. A.

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Nov. 6, 23.

FLINT *v.* LOVELL.

[1934. F. 353.]

Damages—Negligence—Personal injuries—Expectation of life—Whether shortening of expectation can be considered in the assessment of damages.

A plaintiff met with an accident through the negligence of the defendant and sustained serious personal injuries whereby the expectation of his life was materially shortened. The plaintiff brought an action to recover damages for the injuries he had sustained:—

Held (by Greer and Slesser L.JJ., Roche L.J. dubitante), that in assessing the damages the judge was entitled to take into consideration as one of the elements of damage the fact that the plaintiff's normal expectation of life had been materially shortened.

APPEAL from a decision of Acton J.

The plaintiff brought an action against Mr. and Mrs. Lovell to recover damages for personal injuries caused by the negligence of the female defendant in driving a motor-car so as to bring it into collision with the plaintiff's car, with the result that he suffered serious personal injuries.

There was no dispute as to the liability of the defendants to pay damages, and the amount of 400*l.* was agreed as the amount of the special damage which the plaintiff was entitled to recover.

ACTON J. in delivering judgment said: In this case a gentleman of 70 years of age, who, according to the evidence, which I accept, was a man in good health and good condition for a man of his years, who was living an exceptionally active and energetic life and was able to do so without the slightest inconvenience, met with this terrible accident, as a result of which, as I find, his life will be very materially shortened, and he is now unhappily, according to the unanimous testimony of the doctors whom I have heard in this case, not expected to live very long—probably something under a year.

It is a most difficult thing to estimate damages in those circumstances, and I agree with Mr. O'Sullivan that all one can do is to endeavour to approach it as a special jury might be expected to approach it. There is no doubt that he suffered terribly as the result of this accident; there is no doubt that he will go on suffering from the effects—although of course the acute pain is now over—until the time arrives when he dies as a result of the accident. There is no doubt that he has lost the prospect of an enjoyable, vigorous and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred.

The special damages are agreed at a sum of 400*l.* I award the plaintiff the sum of 4400*l.* and for that I give judgment with costs.

The defendants appealed. The appeal was heard on November 6, 1934.

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Maurice Healy K.C. and *N. R. Fox-Andrews* for the appellants. The amount of the damages which the judge awarded is so large that the judge must have given damages for the shortening of the plaintiff's life. That element cannot be taken into account in the assessment of damages for personal injuries. It was laid down in *Baker* v. *Bolton* (1) and reaffirmed by the House of Lords in *Admiralty Commissioners* v. *Owners of S.S. Amerika* (2) that in a civil court the death of a human being cannot be complained of as an injury. If the death of a human being cannot, apart from statute, give a right of action it is difficult to see how the shortening of life can give such a right of action or constitute an independent head of damage. Further, if such a sum as has been given as damages in the present case can be given for the shortening of the life of a man aged 70, a young man or a man of middle life would have to be given damages on a much larger scale for the shortening of their lives. The shortening of a man's life cannot be taken into account at all as an independent head of damages; it can only be taken into account in assessing damages by reason of the increased suffering caused to the man by his knowledge of his impending death.

Richard O'Sullivan K.C. and *Gerald Gardiner* for the respondent. The Court is entitled to take into account the shortening of the plaintiff's life in assessing the damages to which he is entitled for his personal injuries due to the female defendant's negligence. It was held in *Fair* v. *London & North Western Railway Co.* (3) that a jury in assessing compensation for personal injuries occasioned by negligence should take into consideration (inter alia) the injury the plaintiff has sustained in his physical capacity of enjoying life. Field J. in directing the jury in *Phillips* v. *London & South Western Railway Co.* (4) said: " An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to a powerless helplessness with every enjoyment of life destroyed and with the prospect of a speedy death, without the jury being entitled to take that into

(1) (1808) 1 Camp. 493.
(2) [1917] A. C. 38.
(3) (1869) 21 L. T. 326.
(4) (1879) 5 Q. B. D. 78, 80, 86.

account." That direction was not disapproved by the Court of Appeal. The principle laid down by Lord Ellenborough in *Baker* v. *Bolton* (1) that "in a civil court, the death of a human being could not be complained of as an injury," which was followed in *Osborn* v. *Gillett* (2) and in *Admiralty Commissioners* v. *Owners of S.S. Amerika* (3) does not arise in the present case, because in those cases death had supervened whereas in the present case the plaintiff has not died. A living person is complaining of the damage that he suffers by reason of the shortening of his life.

Cur. adv. vult.

1934. Nov. 23. The following judgments were read:—

GREER L.J. This is an appeal from the judgment of Acton J. whereby he awarded to the plaintiff the sum of 4400*l.* as damages for personal injuries caused by the negligence of the female defendant in driving her motor-car so as to bring it into collision with the plaintiff's car, with the result that he suffered grave personal injuries. There was no dispute as to the liability of the defendants to pay damages, and the amount of 400*l.* was agreed as the amount of the special damage which the plaintiff was entitled to recover.

The learned judge came to the conclusion on the facts given in evidence, that before the accident the plaintiff was a man in good health and in good condition for a man of his years. There was some evidence that he had before the accident had heart trouble, but that was contradicted by the evidence of the plaintiff's witnesses, which the learned judge accepted, and I think we must deal with this case as the case of a man who for his age, which at the time of the accident was 69 and at the time of the trial 70, a man of ordinary health who might in the ordinary course be expected to live for at least eight or nine years, subject of course to the average risks of human life. In giving judgment the learned judge said that he found that the plaintiff's life would be very materially shortened, and that at the date of the trial he was unhappily, according to the

(1) 1 Camp. 493. (2) (1873) L. R. 8 Ex. 88.
(3) [1917] A. C. 38.

testimony of the doctors, not expected to live for long, probably something under a year. In the conclusion of his short judgment the learned judge said: "There is no doubt that he has lost the prospect of an enjoyable, vigorous and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred." He then awarded the plaintiff 4000*l.* in addition to the agreed amount of special damages.

It is unnecessary to state in any detail the evidence as to the results of the accident upon the plaintiff. I think we ought to accept the judge's finding that by reason of the accident the plaintiff's future was reduced to pain and suffering for a year with a certainty of additional medical and nursing expenses, and the high probability that by reason of the injuries caused by the defendant's negligence he would be dead within a year. If it was open to the judge to take into account the probability of early death, though this is a border line case, I do not think it can be said that the damages which he awarded, though somewhat on the generous side, are such that the Court of Appeal ought to interfere with his decision and reduce the damages.

The question that arose for consideration during the argument, on a suggestion that came from the Court, was whether, having regard to the decision in the case of *Admiralty Commissioners* v. *Owners of S.S. Amerika* (1) it was permissible in law for the plaintiff to claim damages in respect of a reasonable certainty that his life had been substantially shortened by the wrongful act of the defendant. It is clear from that decision that any person who suffers damage by reason of the death of another occasioned by the wrongful act of a third party in respect of which the law would otherwise give him a cause of action, cannot rely on the death either for the purpose of proving a cause of action, or for the purpose of recovering damages for a cause of action which he proves independently of the death. It is plain that the decision of the Court in that case, which is based on two old cases: *Higgins* v. *Butcher* (2) and *Baker* v. *Bolton* (3), extends not merely to

(1) [1917] A. C. 38.

(2) (1606) Noy, 18; Yelv. 89.

(3) 1 Camp. 493.

prevent the death of another being treated as a cause of action in the English Courts, but also to prevent the recovery of any damages in respect of the death of another person even where the cause of action is complete without any proof of the death. In referring to claims for damages for the loss of the services of a servant or daughter occasioned by the wrongful act of another person Lord Parker of Waddington says (1): " If the writ alleged only an injury per quod servitium or consortium amisit, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only." Lord Sumner's judgment is to the same effect. Both of these judgments contain interesting accounts of how the rule arose out of the old law in which the killing of any subject of the Crown could only be put in suit by a prosecution for felony by the Crown, the only remedy for the relatives of the deceased being an appeal under which the killer, if he did not arrange the matter with the relatives, could be subjected to certain cruel tests. Having regard to the peculiar origin of the rule, I have come to the conclusion that it has no application to a case in which a plaintiff still living at the date of the trial is asking for damages on the ground that he has not only suffered severe pains of body and mental disquietude through the prospect of an early death, but also claims that what might have been an eight to ten years pleasant life in which he could have carried on his normal activities has been converted into a precarious tenure not likely to exceed twelve months, during which he will continue to suffer severely as the result of the wrong of which he complains. It is my considered judgment that under the rules as to measure of damage laid down in *Hadley* v. *Baxendale* (2) the plaintiff's claim to damages on the ground that his life would be shortened was one on which he is entitled to succeed.

I should like to add a few words about the jurisdiction of this Court in appeals where the only contention, or one of the contentions, is that the damages awarded by a judge hearing a case without a jury are excessive. It is not possible to say

(1) [1917] A. C. 46.

(2) (1854) 9 Ex. 341.

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that the tests which have been laid down in cases like *Phillips* v. *London & South Western Railway Co.* (1) apply to an appeal from a judge trying a case without a jury, because an appeal is a rehearing by the Court with regard to all the questions involved in the action, including the question what damages ought to be awarded, but though the established rules with regard to the decisions of juries do not apply to appeals from the decision of judges trying cases without the assistance of a jury, I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

The result is that the appeal will be dismissed with costs.

SLESSER L.J. This is an appeal from a judgment of Acton J. awarding to a gentleman, who was very seriously injured in a collision between motor-cars, the sum of 4400*l.*, 400*l.* of which were special damage. The sole question for our decision in this appeal is whether the damages were excessive. Were it not for certain grounds on which the learned judge bases his determination of damages, I should feel less difficulty about this appeal.

The plaintiff is a more or less wealthy man of 70 years of age. He had, before the accident, enjoyed a vigorous life, devoting himself to sport and recreation which he carried on notwithstanding his age, and the damages, though considerable, are not in themselves so excessive as to merit disturbance.

The difficult question of law arises thus: the learned judge finds, among other matters, that as a consequence of the accident the plaintiff has lost the prospect of an enjoyable, vigorous and happy old age, and that he has suffered terribly as a result of the accident, and that there is no doubt that he will go on suffering from the effects. On this finding, I think that the learned judge would have been justified in awarding to the plaintiff very substantial damages as compensation for the wreck of his physical life, though not a sum so large as 4000*l.*, but Acton J. has gone on to assign the reasons why he has assessed damages at the figure which is impeached, and this most difficult question of law arises, whether one of the grounds which he has so selected is a ground which supports a claim for damages at all. If it does not, I think that it is impossible to say that the sum awarded is not too great. If, on the other hand, the reason to which I shall shortly refer is a valid reason for giving or increasing damages, I do not think that the total sum is such that this Court is called upon to interfere with it.

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(1) (1879) 5 C. P. D. 280.

I therefore approach the problem which the judge has raised by his judgment which is as follows: I have no doubt that he has included as one of the elements of damage the fact that the plaintiff's life has been very materially shortened and that he is not expected to live very long, probably something under a year. Whereas, had the accident not occurred, the learned judge says that he is satisfied on the medical testimony that the plaintiff might have gone on living for a number of years. It was attempted in argument to say that this finding was no more than a finding that the mental pain and suffering of the plaintiff had been increased by the prospect of his early death. In my view, this interpretation is not possible. The learned judge clearly severs the question of the plaintiff's suffering from the consideration of the loss of his prospect of life, for the learned judge states in addition to the physical disabilities and the suffering, the further ground for giving damages that the plaintiff's life has been shortened.

Now, were there no principle to the contrary, it is clear to my mind that the general rule that a plaintiff may claim such damages as arise naturally and directly from the tort, would entitle him to say that the shortening of his life might properly be taken into consideration; for it is certainly on the judge's finding the natural and direct result of the accident.

But it is said that so to hold would be in effect to award the plaintiff damages in respect of death and that the authorities show that such damages cannot be allowed.

As a general proposition of law, if the claim be indeed in respect of death, this argument cannot be disputed. In the case of the *Admiralty Commissioners* v. *Owners of S.S. Amerika* (1) the House of Lords in terms so decided, upholding the principle laid down in *Baker* v. *Bolton* (2) that in a civil court the death of a human being cannot be complained of as an injury. Thus Lord Loreburn, in the *Amerika* case says (3): "It is far too late for this House to disturb the rule expressed by Lord Ellenborough in *Baker* v. *Bolton*" (2), and Lord Parker says (4): "I may point out that the correctness of the ruling in *Baker* v. *Bolton* (2) has been accepted, not only by all Courts in this country, but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it." And again, Lord Sumner adds (5) that the rule that "in a civil court the death of a human being cannot be complained of as an injury" is "a rule which has long been treated as universally applicable at common law," and goes on to say that the rule has received statutory recognition in Lord Campbell's Act.

Faced with this indisputable doctrine, Mr. Richard O'Sullivan for the plaintiff seeks to distinguish it in the present case on the following grounds: he says, as I understand him, that so much of the damage here as was attributable to the shortening of the plaintiff's life was not given in respect of his death but in respect of the destruction of the prospect of future amenities of life which he might otherwise have enjoyed, and, to determine this point, I have found it necessary, once again, notwithstanding the exhaustive historical researches of Lord Parker of Waddington and Lord Sumner in the *Amerika* case (1) to consider, so far as is necessary for the present case, certain aspects of the rule in *Baker* v. *Bolton*. (2) In particular, I would emphasize this passage from the speech of

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(1) [1917] A. C. 38.

(2) 1 Camp. 493.

(3) [1917] A. C. 41.

(4) Ibid. 42.

(5) Ibid. 50.

Lord Parker in the *Amerika* case where he says (1): "It is almost a commonplace that apparent anomalies in our law can generally be explained if we consider the conditions of its historical growth."

A person upon whom the law imposes a duty and who grossly neglects to perform it or performs it with gross negligence may be guilty of manslaughter, a felony: *Rex* v. *Tessymond* (2), per Bayley J. According to Sir William Holdsworth (History of English Law, vol. 3, p. 331), "The rule that if a tort amounts to a felony the injured party's right of action is barred does not seem to be expressly stated in the Year Books." According to the same learned author, the general application of the rule is due to the fact that "in the great majority of cases in which death ensues as a result of a tort felony has been committed" (Ibid., p. 334).

The case of *Higgins* v. *Butcher* (3), decided in 1606, appears to be one of the earliest express statements of the rule that if a tort amount to a felony the injured party's right of action is barred. Tanfield J. there says: "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence, and private wrong offered to the master before, and his action is thereby lost." (Fenner and Yelverton JJ. concurring.)

This is now too wide, and to give effect to the later authorities the rule must be construed in a more strict and limited sense. Thus, Lord Parker points out in the *Amerika* case (4), the generality of this rule was modified some years later in the case of *Markham* v. *Cob* (5) and in *Dawkes* v. *Coveneigh* (6), which, says Lord Parker, are authorities that in such felonies as burglary or larceny, "the trespass is not drowned in the felony, so as to preclude an action for the trespass, provided the requirements of public policy are first satisfied." These

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(1) [1917] A. C. 44.

(2) (1828) 1 Lewin C. C. 169.

(3) Noy, 18; Yelv. 89.

(4) [1917] A. C. 38, 48.

(5) (1625) Latch, 144; Noy, 82.

(6) (1652) Sty. 346.

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cases, he continues, were quoted with approval by Sir Matthew Hale (1 Hale's Pleas of the Crown, p. 546) and by Lord Ellenborough in *Crosby* v. *Leng* (1) and, says Lord Parker, "it cannot be disputed that they are good law."

It is true that in *Ex parte Ball* (2) Baggallay L.J. said that "notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice." But, as Lord Parker points out in the *Amerika* case (3), the Lord Justice says "a felonious act *may* (not that it *must*) give rise to a civil action." Lord Parker proceeds: "Most felonies involve a wrong less than a felony, and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings." The problem raised by mayhem, an injury amounting to the deprivation of a limb useful for the purpose of fighting, is possibly soluble on the ground that mayhem never became an indictable felony although prosecuted by appeal of felony, and Britton actually recommends complainants in such cases to bring the action of trespass rather than the appeal as being under the degree of felony. Britton 49 (in trans. by Nichols (1865), vol. 1, p. 123): see *Armstrong* v. *Lisle.* (4)

In any event, whatever the modern extent of the rule that where the act complained of is a felony the civil action is lost, the whole principle depends upon the fact that the act itself is not only tortious but also felonious. As Sir Frederick Pollock writes (Law of Torts, 13th ed., p. 65): "Homicide is presumably felonious. Hence no civil action could be allowed for causing the death of a human being. The affinity of the rule, if any, is with the principle, long recognized but never properly defined till our own time, of trespass being 'merged in felony.'"

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(1) (1810) 12 East, 409.

(2) (1879) 10 Ch. D. 667, 674.

(3) [1917] A. C. 49.

(4) (1696) Kely. Cr. Cas. 93; Salk. 60.

With these historical considerations in mind, I approach the present case. It is obvious that in so far as the plaintiff is still living, the doctrine actio personalis moritur cum persona, can have no application; and I have not paused to consider it. But equally, upon the *Baker* v. *Bolton* (1) principle, it is impossible to say that the tort, in so far as it shortened the plaintiff's life, could in any circumstances merge in the felony, for the defendants, fortunately, did not kill the plaintiff and, if mayhem or wrongs analogous be excluded from consideration, have committed no felony at all. At most, criminally, the defendants' wrong-doing might have amounted to a misdemeanour on which, alternatively, trespass could always properly be brought.

The final result is to point to a highly artificial rule limited to certain defined subject matter. There is, in my judgment, no scope in the present case for the application of the principle which I have discussed, which may apply where a felony has been committed, and no reason why, among other matters, the shortening of the plaintiff's life should not be taken into account in the assessment of damages. I would quote in conclusion in this connection a passage from Blackstone's Commentaries (vol. 3, p. 122), where, dealing with injuries, the learned author writes: "Injuries, affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution."

The view I here take does not appear to be inconsistent with the general principles laid down in *Phillips v. London & South Western Railway Co.* (2), and particularly with the doctrine of Cockburn C.J. in that case (3), where he mentions, as matters for consideration for a jury, not only the bodily injuries sustained and the pain undergone, but also "the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent." And his dictum that, "as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained."

(1) 1 Camp. 493.
(2) 5 Q. B. D. 78.
(3) (1879) 4 Q. B. D. 406, 407.

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In my opinion, for the reasons here stated, I think that the learned judge was entitled to take into consideration all the matters which he has mentioned in his judgment, and I see no reason to disturb the damages which he has found as a result of those considerations.

Roche L.J. I regret that I am unable to concur in the judgment of the Lords Justices. I am of opinion that the amount awarded to the plaintiff by the judgment under appeal was excessive and ought to be reduced. I agree with the view expressed by Greer L.J. that, notwithstanding the powers this Court undoubtedly possesses to review any decision of a judge, it ought not lightly to interfere with the conclusion reached by a trial judge as to the quantum of compensation to be awarded to a plaintiff, and I should certainly not favour such interference merely because I should myself have awarded somewhat more or less than the trial judge.

But in the present case, I am satisfied that the figure awarded by the learned judge was very much in excess of the proper figure, and to adopt the test laid down by Greer L.J. was an entirely erroneous estimate of the amount of the damage. My reasons for this opinion are as follows: the evidence showed that the plaintiff was for a man of 70 fairly healthy and likely to live some years if the accident had not happened, and that by reason of the accident this anticipation of life was reduced to not more than a year from the date of hearing. I do not doubt that this evidence was relevant, and had a very material bearing on the amount of damages to be awarded. I so think for two reasons: firstly, because the fact of such a reduction was a very strong piece of evidence upon the seriousness of the injuries unrepaired by medical treatment, and of the loss of vigour which is mentioned in the case cited by Slesser L.J., and such lasting injuries are properly an element, and not seldom the principal element, to be considered in assessing damages in a case of this kind; secondly, because impending death and the weakness preceding it and the knowledge of these conditions naturally produce or increase the pain and suffering which constitutes another element to

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be considered in the assessment of damages in a case of personal injuries. The reasons given by the learned judge for his decision are not very full, and I make no criticism of that; but I infer from his language that he did consider and take into account the shortening of the plaintiff's life in both the above connections.

But I also infer that the learned judge went further and included in the damages a sum, and I doubt not a substantial sum, for the actual or prospective shortening of the plaintiff's life regarded as a further and independent head of damage. This is, I think, open to the objection that it has, in my opinion, tended to and resulted in compensation being given for the same matter more than once.

With regard to the interesting point as to the applicability to the present circumstances of the rule of law recognized and reapproved by the House of Lords in the case of *Admiralty Commissioners* v. *Owners of S.S. "Amerika"* (1), I entertain considerable doubts but I am not prepared to dissent from the conclusions of the Lords Justices who have given judgment. My doubts arise from these considerations: Firstly, on the theoretical side, though it is no doubt true that the law of England is not in all respects logical, it would seem to go to an extreme in lack of logic if, while the death of a human being does not, apart from statute, give a right of action, and does not, where a cause of action exists, found or constitute an independent right or head of damage, yet the shortening of life can give such right of action, and can found or constitute an independent right or head of damage. There would thus, as it seems to me, be allowed to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant.

Secondly, from the practical point of view, I think that the admission of this head of damage as a separate and independent head is novel and difficult of application. In the hearing of very many cases of personal injuries I do not remember this head of damage being so treated.

(1) [1917] A. C. 38.

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The difficulty of application arises out of the question of age differences. If the case of this plaintiff merits the sum awarded, I do not see how or by what sum a similar shortening of the life of a young man or middle aged man could be adequately met.

A further difficulty of application is this, that it seems to me extremely hard to avoid the danger of giving a plaintiff compensation for the same thing more than once under various heads of damage. With great respect to the learned judge, I cannot help thinking that this is what has happened in the present case.

Finally, this head of damage seems to me to involve inquiries and speculations inappropriate to and difficult for a court of law, as for example the disposition and outlook on life as well as the material circumstances of a plaintiff.

Ben[illegible] Gambling 7 AC 157 166

But in spite of the doubts thus expressed, I adopt for the purpose of my judgment the principle that this factor ought to be allowed for as an independent head of damage, and that full compensation ought to be made for the shortening of the plaintiff's life, so far as it can be made in money. Nevertheless, I am of opinion that the amount awarded by the trial judge is so excessive that this Court should interfere. It is perhaps right that I should express in figures my view of what the circumstances of the case warrant, and I do so by saying that the utmost figure which in my judgment is warranted is the sum of 3000*l.*, to include the agreed item of 400*l.* for special damage.

Holding the view that so substantial a reduction in the amount of the judgment would be proper on any view of the law, I should allow the appeal, but having regard to the contrary opinions of Greer L.J. and Slesser L.J. it will, of course, be dismissed.

Appeal dismissed.

Solicitors for appellants: *Joynson-Hicks & Co.*
Solicitors for respondent: *Wiley & Powles.*

R. F. S.

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Oct. 19, 22;
Dec. 3.

London — Building — Generating Station — Surveyor's Fees — London Building Act, 1930 (20 *&* 21 *Geo.* 5, *c. clviii.*), *ss.* 58, 59, 89, 173, 227, *and Fifth Schedule.*

The London Building Act, 1930, s. 227, provides that where a local authority or a company has statutory powers for the supply of electricity in London, the buildings of that authority or company " used as a generating station or for works shall be deemed to be special buildings to which the general provisions of Parts V., VI., and VII. of this Act and the First and Second Schedules thereof do not apply."

A generating station, coming within s. 227, having been erected according to plans approved by the London County Council, the building being a steelframed building clothed with brickwork and reinforced concrete, to which ss. 58 and 59 in Part VI. of the Act were applicable, the district surveyor claimed from the builders the fees prescribed for a survey under Parts III. and IV. of the Fifth Schedule to the Act:—

Held, that the expression " general provisions " in s. 227 limited the parts of the Act which were excluded by that section to those which applied to all buildings, and that ss. 58 and 59, under which the building was erected, were not general provisions relating to all buildings but were special provisions relating to buildings constructed as therein mentioned, and were therefore not " general provisions of Parts V., VI., and VII." within the meaning of s. 227 which were deemed not to apply to the generating station, and that therefore the district surveyor was entitled under s. 173, sub-s. 2, to the fees he claimed.

Decision of the Divisional Court [1934] 2 K. B. 85 reversed.

Appeal from a decision of the Divisional Court (1) upon a case stated by a Metropolitan police magistrate.

A complaint was preferred by Alfred Lane, the district surveyor for Battersea, against John Mowlem & Co., Ld., contractors, for having failed to pay a fee of 476*l*. 10*s*. owing by them to him under the Fifth Schedule of the London Building Act, 1930, for a building of a cubical extent not exceeding 18,000,000 cubic feet and being the electrical power house at Battersea Power Station, Kirtling Street, Battersea.

At the hearing of the complaint on July 12 and 19, 1933, the following facts were proved or admitted:—

(*a*) The London Power Company was a company having

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(1) [1934] 2 K. B. 85.

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statutory powers for the supply of electricity for certain purposes in London and the Battersea Power Station had been constructed and would shortly be operated as a generating station for the supply of electricity for such purposes.

(*b*) John Mowlem & Co., Ld., were employed by the London Power Company to do certain building work on and about the Battersea Power Station during the construction thereof.

(*c*) The Battersea Power Station was erected according to plans submitted to and approved by the London County Council by virtue of s. 227 of the London Building Act, 1930.

(*d*) Over 700 copies of the said plans and 111 consents of the London County Council in all were from time to time furnished by the London County Council to Alfred Lane as district surveyor for Battersea and the district surveyor surveyed the said buildings to ascertain that the same were built in accordance therewith and in performance of his duty as district surveyor.

(*e*) John Mowlem & Co., as one of the builders, delivered to Alfred Lane as district surveyor a notice under s. 161 of the London Building Act, 1930, of intention to erect "upon foundations already provided a steel framed building as Power House to designs already notified to the London County Council by the London Power Company, Ld.," on or about February 11, 1931. John Mowlem & Co. proceeded with the erection in accordance with the said notice, and the roof of the said building was covered in by them in or about the month of November, 1932.

(*f*) The cubical extent of the said building was 18,000,000 cubic feet.

(*g*) An account for 476*l.* 10*s.* was delivered by Alfred Lane to John Mowlem & Co. by registered post on or about February 23, 1933.

(*h*) The district surveyor did not himself approve the plans but surveyed the work and saw that it was carried out by the respective builders in accordance with the plans approved by the London County Council.

(*i*) The district surveyor, while maintaining that having regard to the nature of the building he was entitled to base

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his claim on Part IV. of the Fifth Schedule and charge thereunder 2½ times the amount payable under Part III. (*b*) of such Schedule (without taking into account the additional sums specified in that heading), reduced the amount to a single fee of 476*l.* 10*s.* calculated under such Part III. (*b*) because he had not himself made the necessary calculations with respect to the steel framework of the buildings since that had been done by the London County Council when approving the plans in accordance with s. 227 and not by the district surveyor under s. 58.

(*j*) The Battersea Power Station was a building of the type described in Part IV. (*a*) of the Fifth Schedule.

(*k*) The concrete foundations of the building were constructed by the Foundation Company, Ld., and the London Power Company, Ld., and the steelwork by Sir William Arrol & Company, Ld., and the steel framework was clothed with brickwork and reinforced concrete by John Mowlem & Co.

It was contended on behalf of the district surveyor that John Mowlem & Co. as the builders within the meaning of ss. 173 and 177 of the London Building Act were liable to pay fees in respect of the Battersea Power Station. It was further contended on behalf of the district surveyor that this was a special building to which s. 89 applied and that nothing in s. 227 of the Act exempted John Mowlem & Co. from liability to give notices under s. 161 or to pay fees under s. 173 and the Fifth Schedule; that on the true construction of s. 227 John Mowlem & Co. were not exempted from the provisions of Parts V., VI., and VII. of the said Act nor released from the liability to pay such fees unless expressly exempted by the Council from such liability; and the Council had not so expressly exempted them.

It was contended on behalf of John Mowlem & Co. that by virtue of s. 227 the Battersea Power Station was exempt from the provisions of Parts V., VI., and VII. of the Act; that in consequence of such exemption Part III. of the Fifth Schedule did not apply to the said station having regard to the exception stated in the said Part III. (*b*)—namely, " except buildings exempt from the provisions of Parts VI. and VII. of this Act,"

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that, alternatively Part III. of the Schedule did not apply to the said station having regard to the further exception stated in the said Part III. (*b*)—namely, " Buildings referred to in heading (*a*) of Part IV. of this Schedule " ; that therefore if fees were to be claimed at all under the said Act such fees must be claimed under Part IV. It was further argued that even if it could not be said that by virtue of s. 227 this building was exempt from the general provisions of Parts V., VI., and VII. of the Act, nevertheless the district surveyor could only claim fees under Part IV. of the Fifth Schedule if he also brought himself within s. 173, sub-s. 2, which provides that fees under such part are payable where under the provisions of s. 58 or s. 59 of the Act or of any regulations in force thereunder any building is erected, and that in the circumstances it could not be said that the building in question was erected under those sections but under s. 227, and further that by s. 58, sub-s. 7, and s. 59, sub-s. 12, those sections respectively could not apply and therefore there was no provision in the Act entitling the district surveyor to recover fees in the circumstances of this case.

The following sections of the London Building Act, 1930, were referred to : ss. 5, 58, 59, 81, 89, 165, 173, 177, 212, 223, 224, 225, 226, 227, 228, 236, sub-ss. 1 and 2, Third Schedule, Fifth Schedule (Parts III. and IV.), Sixth Schedule ; and the following authority : *London County Council* v. *District Surveyors' Association and Willis*. (1) [Sects. 58, 59, 173 and 227 are summarized or set out below. (2)]

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(1) [1909] 2 K. B. 138.

(2) The London Building Act, 1930 (20 & 21 Geo. 5, c. clviii.).

Sects. 58 and 59 make provisions as to buildings of metal skeleton construction and reinforced concrete.

Sect. 173 : " The following provisions shall have effect with respect to fees payable by builders or by owners or occupiers to district surveyors (that is to say) :—

Sub-s. 1 : " The builder or in his default the owner or occupier as the case may be of a building structure or work mentioned in Part III. of the Fifth Schedule to this Act shall pay to the district surveyor in respect of such building structure or work fees in accordance with the said Part III. or such other fees not exceeding the amount specified in the said Part III. as may from time to time be directed by the Council."

Sub-s. 2 : " Where under the provisions of s. 58 or s. 59 of this Act . . . . any building is erected

The magistrate was of opinion that on a true construction of s. 227 of the said Act the phrase "shall be deemed to be special buildings to which the general provisions of Parts V., VI., and VII. of this Act, and the First and Second Schedules thereof do not apply" did not mean that the said buildings were exempt from the general provisions of Parts V., VI., and VII. and the First and Second Schedules, unless so exempted by the Council, and that when these parts or any of them were inapplicable or inappropriate other parts of the Act would be applied, e.g., s. 89. He accordingly adjudged that the district surveyor was entitled to recover from John Mowlem & Co. the sum of 476*l.* 10*s.* with costs, but stated this case for the opinion of this Court.

The question on which the opinion of the Court was desired was whether, upon the above statement of facts, the magistrate came to a correct decision and determination in point of law.

The Divisional Court held that the expression "general provisions" in s. 227 of the London Building Act, 1930, referred to all the provisions in Parts V., VI., and VII. of the Act, and that as ss. 58 and 59, under which the district surveyor claimed, were contained in Part VI. of the Act he was not entitled to recover the fees prescribed for a survey under Parts III. and IV. of the Fifth Schedule to the Act.

The district surveyor appealed. The appeal was heard on October 19 and 22, 1934

Croom-Johnson K.C. and *W. H. Duckworth* for the appellant.

Singleton K.C. and *Wynn Werninck* for the respondents, John Mowlem & Co., Ld.

. . . . the builder or in his default the owner or occupier as the case may be of the building shall pay to the district surveyor fees in accordance with Part IV. of the Fifth Schedule to this Act."

Sect. 227: "Where a local authority or a company has statutory powers for the supply of electricity in any district in London the buildings of that local authority or company used as a generating station or for works shall be deemed to be special buildings to which the general provisions of Parts V., VI., and VII. of this Act and the First and Second Schedules thereof do not apply and plans thereof shall be submitted to the Council for their approval . . . . "

The argument consisted of an examination of various sections of the London Building Act, 1930, and in substance was a repetition of the argument in the Divisional Court.

Cur. adv. vult.

1934. Dec. 3. The following judgments were read:—

GREER L.J. Alfred Lane, the appellant in this case, who as the district surveyor for Battersea had done certain work in supervising the erection of the Electrical Power House, Kirtling Street, Battersea, a building or structure within the meaning of the London Building Act, 1930, claimed before the appropriate court of summary jurisdiction that he was entitled to be paid by the respondents, Messrs. John Mowlem & Co., Ld., the builders of the power station (hereinafter called the "builders"), the sum of 476*l.* 10*s.* by reason of the provisions of the said Act. The appropriate tribunal to deal with his case in the first instance, the magistrate of the South Western Police Court, on hearing evidence decided the surveyor's claim in his favour, subject to a case which he stated for the decision of the High Court of Justice. The case came before a Divisional Court for decision (1), and after arguments the Court reversed the decision of the magistrate and decided that on the facts stated the claim of the appellant ought not to have succeeded. The district surveyor appeals from that judgment to this Court.

The answer to the question raised by the case depends upon the true interpretation of two sections of the London Building Act, 1930, s. 173, which is in Part XIV., and s. 227, which is in Part XVII., but in order to arrive at the meaning of these two sections it will be helpful to refer to other sections of the Act, and to earlier Acts in pari materia. Sect. 154 (in Part XIV.) of the Act of 1930 provides that "subject to the provisions of this Act every building or structure and every work done to in or upon any building or structure . . . . shall be subject to the supervision of the district surveyor appointed to the district in which the building structure or

(1) [1934] 2 K. B. 85.

street is situate." The definition section in the Act, s. 5, does not contain any definition of the words "building" or "structure," but I think there can be no doubt that the Battersea Power Station is a building or structure within the meaning of s. 154. It was in fact built subject to the supervision of the appellant, the district surveyor of Battersea, and he undoubtedly did a very considerable amount of work in connection with it.

Sect. 81, which is in Part VI. of the Act, provides that "no building or part of a building used for purposes of trade or manufacture shall be of a cubical extent exceeding 250,000 cubic feet unless it is divided" in a particular way. Sub-s. 4 provides that: "The provisions of this section shall not apply to any building which being at a greater distance than 2 miles from Saint Paul's Cathedral is used wholly for the manufacture of the machinery and boilers of steam vessels or for a retort house or for the manufacture of gas or for generating electricity and which consists of one floor only and is constructed of brick stone iron or other incombustible materials throughout." And it further provides that: "Every such building shall for the purposes of Part VII. of this Act be deemed a building to which the general provisions of this Part of this Act are inapplicable." I cite this section because the term "general provisions" of Part VI. are referred to as being inapplicable, and the same question which arises for decision in this case, namely whether the words "general provisions" mean all provisions or only part of them, could arise with reference to a building which is subject to the provisions of s. 81. Sect. 89 also makes reference to the "general provisions of Part VI." Part VI. of the Act is a Part that deals with the construction of buildings, and it contains provisions which apply to all buildings, and provisions which apply only to buildings of a described type: see especially ss. 58 and 59, with which I will deal later. Sect. 227 is in the following words: "Where a local authority or a company has statutory powers for the supply of electricity in any district in London the buildings of that local authority or company used as a generating station or for works shall be deemed to be special buildings to which the general provisions of Parts V., VI., and VII. of this Act and the First and Second Schedules thereof do not apply and plans thereof shall be submitted to the Council for their approval and the Council shall have power to authorise the buildings to be erected of greater dimensions than 250,000 cubic feet and in other respects to exempt the buildings from any of the provisions of this Act if they think fit." It is to be observed that the section does not say that the Third Schedule is to be deemed not to apply, nor does it say that the Fifth Schedule is to be deemed not to apply. The Divisional Court have held that in this section "general provisions" means all the provisions of Parts V., VI., and VII. of the Act, including of course ss. 58 and 59. Sect. 227 expressly, if I may use the expression, refrains from excluding the operation of the Third and Fifth Schedules to the buildings described in the section. But it is plain that if s. 58 is cut out of the Act as applicable to buildings constructed under s. 227, the Third Schedule is also excluded, as it is only by virtue of s. 58 that the Third Schedule acquires statutory force. This, in my opinion, is contrary to the manifest intention of the section indicated by the fact that the Third Schedule is not included in the parts of the Act which are to be deemed not to apply to buildings of the kind mentioned in the section. Sect. 173, which is in Part XIV. of the Act, expressly provides for the payment to the surveyor of the fees set out in Part IV. of the Fifth Schedule in respect of his services in connection with the erection of buildings of the kind mentioned in ss. 58 and 59 of Part VI. I cannot myself explain the use of the word "general" either in s. 203 of the Act of 1894 or in s. 227 of the Act of 1930 as other than a qualifying word which has the effect of limiting the excluded parts of the Act to whose which apply to all buildings; accordingly, in my judgment, ss. 58 and 59, which are not general provisions relating to all buildings but are special provisions relating to buildings constructed as therein mentioned, are not "general provisions of Parts V., VI., and VII." within the meaning of s. 227 which are to be deemed not to apply to buildings such as the Battersea Power Station built subject to the provisions of s. 227 of the Act of 1930.

I now turn to s. 173 of the Act, which is the section under which the appellant must bring his claim if he is entitled to succeed. So far as material the section reads as follows: "The following provisions shall have effect with respect to fees payable by builders or by owners or occupiers to district surveyors (that is to say): (1.) The builder or in his default the owner or occupier as the case may be of a building structure or work mentioned in Part III. of the Fifth Schedule to this Act shall pay to the district surveyor in respect of such building structure or work fees in accordance with the said Part III. or such other fees not exceeding the amount specified in the said Part III. as may from time to time be directed by the Council. (2.) Where under the provisions of s. 58 or s. 59 of this Act or of any regulations in force thereunder any building is erected or converted or any addition or alteration or any other work is made or done to or on any building the builder or in his default the owner or occupier as the case may be of the building shall pay to the district surveyor fees in accordance with Part IV. of the Fifth Schedule to this Act. . . . . (4.) Where any work or service is carried out or performed by the district surveyor in pursuance of Part VIII. of this Act the fees payable to him under paragraph (*b*) of sub-s. 1 of the last foregoing section or under the last foregoing paragraph of this section shall be in addition to and not in substitution for any fees which may be payable to him under any other provisions of this Act." My view of this section is that sub-s. 2 relates to the erection of any building to which the provisions of ss. 58 and 59 of the Act, or any regulations in force thereunder, apply. In the strict sense of the word the building is not erected under the provisions either of ss. 58, 59, or 227. Power to erect it arises under other Acts of Parliament, but in my judgment it is built both under ss. 58 and 59 and under s. 227 within the meaning of the statute, because it is a building which is subject to the provisions contained in those sections. If it is within sub-s. 2 of s. 173, then the surveyor's fees are regulated by Part IV. of the Fifth Schedule, sub-s. 2. Under that sub-section the

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surveyor was entitled to claim a fee equal to the amount payable under heading (*b*) of Part III. He claimed that amount, and was awarded that amount by the magistrate, but he was also entitled to claim a larger fee equal to two and a half times the amount of the fee payable under heading (*b*) of Part III. of the Schedule in respect of a building of a cubical extent equal to the cubical extent of that portion of the mixed building which is of reinforced concrete or metal skeleton construction or both, but he did not claim the larger fee mentioned in Part IV., 2 (ii.). He was not bound to claim it but was entitled to be content, as he was in this case, with the fee mentioned in Part IV., 2 (i.).

It has been suggested that the absence of any reference to the Third Schedule in s. 227 is due to a mere accident of imperfect drafting arising through the copying of the section of an earlier Act of Parliament without sufficient consideration of the effect of the words on the new situation created by the later Act. It may, therefore, be useful to consider the earlier Acts with a view to seeing whether under any of those Acts the district surveyor had to do work on buildings of the kind in question without any provision for his remuneration.

It may be important to ascertain whether under the London Building Act, 1894 (57 & 58 Vict., ch. ccxiii.), and the subsequent amending statutes prior to the Act of 1930, the district surveyor would have been entitled to remuneration for work done in connection with a building within s. 203 of the Act of 1894. By s. 154 of the Act of 1894 it was provided that there should be paid by the builder or in his default by the owner or occupier as the case might be of the building or structure in respect whereof the same were chargeable to every district surveyor in respect of the several matters mentioned in Parts I. and III. of the Third Schedule to that Act the fees therein specified or such other fees not excdieeng the amounts therein specified as might be directed by the Council. Sect. 154 is in Part XIII. of the Act, and is therefore not one of the Parts of the Act which by s. 203 are to be deemed not to be subject to the general provisions of Parts V., VI., and VII., and the First and Second Schedules of the Act. The Third Schedule of the Act of 1894, in Part I., deals with the fees payable to district surveyors on new buildings, and provides for a fee for every building not exceeding 400 square feet in area and not more than two storeys in height. It apparently makes no provision for the fees for a building exceeding 400 square feet in area, but it expressly contemplates the payment of an additional fee in respect of public buildings which are by s. 78 (which is in Part VI. of the Act) buildings in respect of which the district surveyor is required to perform certain duties. In 1894 steel frame buildings and reinforced concrete buildings were apparently unknown in this country, and no provision was made in respect of the plans for such buildings, for the duties of the surveyor in relation thereto and to the supervision of buildings, or the fees payable in respect thereof, but in 1909 it was thought necessary by an amending Act, the London County Council (General Powers) Act, 1909 (9 Edw. 7, ch. cxxx.), to make provision for the plans, the supervision of such buildings, and for the duties and remuneration of the district surveyor in relation thereto. By s. 22 of the Act of 1909 it was provided that notwithstanding anything in the Act of 1894 or amending Acts it should be lawful to erect subject to the provisions of that section buildings wherein the loads and stresses are transmitted through each storey to the foundations by a skeleton framework of metal, or partly by a skeleton framework of metal and partly by a party wall or walls; but buildings so erected should (subject to any exemptions contained in the principal Acts or any of them) be subject to and comply with all such provisions of the principal Acts, or any of them, and any by-laws in force thereunder, as might not be inconsistent with, or contrary to, the provisions of that section. The section contained numerous requirements with regard to the strength of the steel and as to the girders, rivets, etc. By sub-s. 31 of s. 22 of the Act of 1909 it was provided that notices and plans should be served on the district surveyor. By s. 23 power was given to make regulations with respect to reinforced concrete buildings, and s. 24 provided that the provisions above mentioned of Part IV. of the Act of 1909 should be deemed to form part of Part VI. of the Act of 1894. Sect. 26 of Part IV. of the Act of 1909 contained provisions for increased fees to the district surveyor in the case of what might be called metal frame buildings, giving him fees of two and a half times the ordinary scale. This seems to have the odd result that if "general provisions" in s. 203 of the Act of 1894 includes all the provisions of Part VI., then the new provisions of the Act of 1909 when inserted in Part VI. of the Act of 1894 would apparently make the provisions of the Act of 1909 as to the duties and remuneration of the district surveyor of no application to buildings which a local authority or company caused to be erected under statutory powers which are within the description mentioned in s. 22 of the Act of 1909. That is to say, that while providing for the duties and remuneration of the surveyor, Parliament were, by placing the sections relating thereto in Part VI. of the Act of 1894, rendering those provisions entirely nugatory. If they are general provisions they would become nugatory. If, as I think, they are special provisions they would not become nugatory.

After some other amending Acts to which it is unnecessary to refer, a further amending Act called the London County Council (General Powers) Act, 1928 (18 & 19 Geo. 5, ch. lxxvii.), was passed, which, by means of a schedule, provided for payment of fees to the district surveyor. By sub-s. 3 of s. 5 of that Act it was provided that the builder or in default of him the owner or occupier should pay to the district surveyor in respect of any services performed by him under the Building Acts fees in accordance with Part I. of the Second Schedule, and by sub-s. 4 it was provided that where under the provisions of Part IV. of the Act of 1909 or any Act amending that Part of that Act or any regulations in force thereunder any building was erected or converted or any addition alteration or other work was made or done to or on any building the builder or in default of the builder the owner or occupier of the building should pay to the district surveyor fees in accordance with the Third Schedule to the Act of 1928. The Third Schedule to the Act contains provisions (*a*) as to new buildings of the ordinary kind, and (*b*) as to fees on buildings wholly or partly of reinforced concrete or metal skeleton construction. If this statute is read as one with the principal Act it would be necessary to construe the principal Act in a way which would leave effective the special provisions of the Act as amended relating to the duties and remuneration of the district surveyor in respect of any buildings in which steel construction or reinforced concrete construction was used. In order to do this it would be necessary to give to the words "general provisions" in the Act of 1894, as amended, the same meaning as I have above indicated I should give to the same words in the Act of 1930. It seems to me that in the absence of a reference in the Act of 1909 to the inapplicability of the Third Schedule, and the express provisions of the Act of 1928, it is difficult, reading the Acts together, to resist the conclusion that their effect is that in relation to any building of steel frame construction or reinforced concrete construction the district surveyor has statutory duties and statutory remuneration. If the question we have to deal with had arisen after the Act of 1928 and before the Act of 1930, I should myself have arrived at the same result that I have above indicated on confining my attention to the wording of the Act of 1930. So far from thinking that the history of the legislation on this subject supports the view taken by the Divisional Court, I respectfully think that it has the opposite tendency. Construing s. 227 of the London Building Act of 1930 on the principles which are applicable to statutes as well as to any other written documents, the words must be construed in their natural and ordinary meaning unless such a construction results in an absurdity or repugnancy. I have come to the conclusion that the Third Schedule was expressly left out of the excluded provisions in order to preserve the remuneration of the district surveyor for the additional work imposed upon him in relation to buildings of steel construction or reinforced concrete construction, and that in order to give effect to that intention the words "general provisions" must be interpreted as meaning something less than all the provisions, and that they do not include any portion of Part VI. which applies not to buildings generally but to the type of buildings above mentioned.

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For the reasons above indicated I think the appeal ought to succeed, the judgment of the Divisional Court should be reversed, and the question put by the magistrate in the special case should be answered by saying that he came to a correct decision and determination in point of law, and if this view prevails, the respondents should pay the appellant's costs here and below.

MAUGHAM L.J. This appeal, in my opinion, raises a question as to the true construction of the London Building Act, 1930, on which different minds may well differ. This is due to the defective drafting of various sections of the Act and in particular to the singular form of s. 227. I have been unable to find with any satisfaction to myself any certain ground from which the intention of the legislature on this question of construction may be ascertained. It would serve no useful purpose if I stated the difficulties which seem to me to arise both upon the interpretation put on the various relevant sections by the Divisional Court and that put upon the same sections by the judgments of Greer L.J. and Roche L.J. which I have had the advantage of reading. I will only observe that although I have the greatest difficulty in ascertaining from the Act itself which provisions of Part VI. are being referred to in s. 227 as " general provisions," (since they are all in some sense " general ") on the other hand I feel myself unable to act on the conjecture, however probable it may be, that the omission from s. 227 of any reference to the Third Schedule is due to an exact but careless copying of s. 203 of the London Building Act, 1894. Judicially I think I am bound to regard the omission in s. 227 of any reference to the Third Schedule as intentional, from which it would seem to follow, since the First and Second Schedules are mentioned, that the Third Schedule, which is not mentioned, is to have effect with regard to the buildings to which the section relates. The next logical step must I think be that ss. 58 and 59 must apply to the buildings referred to since the Third Schedule derives its force from s. 58, and if this be accepted I must also accept the reasons and the conclusions contained in the judgments of my brethren. I have been unable to conjecture why an electric power station erected under statutory powers should be considered to require in the course of its erection the supervision of the district surveyor if the building is one of the kind described in s. 58 or s. 59 of the Act, whilst similar buildings of a railway company or of a gas company apparently do not (see s. 223); but I am equally unable to guess why the express language of exemption used in s. 223 was not employed in s. 227.

On the whole then, after some fluctuation of opinion, I must with great respect differ from the clear and concise judgment of the Divisional Court and agree that the appeal should be allowed.

ROCHE L.J. This is a difficult case and it is with the utmost diffidence that I venture to disagree with the judgment of a Divisional Court for whose experience and learning I entertain such unbounded respect. But after anxious consideration I have arrived at the conclusion that the judgment under appeal is erroneous and that the appeal should be allowed.

The material sections of the Act upon the construction of which the decision of this case ultimately depends have been already set out and fully discussed in the judgment of Greer L.J. I therefore propose to preface such further observations as I have to make upon such construction by a consideration of the general position and duties and rights of the district surveyor in the circumstances found to exist in this case and of the history of the legislation culminating in the London Building Act of 1930. It is in my opinion the more relevant and necessary to consider such history in view of the fact that the Act of 1930 is a consolidating Act.

Under the present Act as under the earlier Acts the district surveyor is not a servant of the County Council though appointed by that body. He is an independent functionary with a position and with duties and rights fixed and defined by the statute. Amongst his rights is the right to remuneration for the performance of duties imposed upon him, and the general scheme of the earlier Acts and the present Act was and is that payment is by fees and not by salary, and that for work done for the Council, e.g., in regard to streets and building lines, he is to be paid by the Council (s. 172 of the Act of 1930), and that in regard to other work he is to be paid by the builder or the building owner (s. 173 of the Act of 1930). Unless the present case and similar cases be such an instance counsel did not refer to any instance in the Act where a duty to do work of this sort gratuitously was imposed on the surveyor. Even where buildings are exempted buildings as defined in Sch. V., Part III., of the Act a small fee is provided for a survey, if one be necessary, to ascertain whether the building is so exempt and whether other conditions are fulfilled.

The facts as to the work done by Mr. Lane the surveyor are set out in the case stated by the learned magistrate as follows: (*c*) The Battersea Power Station was erected according to plans submitted to and approved by the London County Council by virtue of s. 227 of the London Building Act, 1930, under consents dated (inter alia) the 13th November, 1929, 6th December, 1929, 1st March, 1930, 21st March and 3rd November, 1931, and 10th November, 1932. (*d*) Over 700 copies of the said plans and 111 consents of the London County Council in all were from time to time furnished by the London County Council to Alfred Lane as district surveyor for Battersea and the district surveyor surveyed the said buildings to ascertain that the same were built in accordance therewith and in performance of his duty as district surveyor.

It was agreed between counsel at the hearing of the appeal that the consents mentioned in the case were to be treated as annexed thereto. Passages from three of the consents may be taken as representative. That of December 6, 1929, gave approval under s. 203 of the London Building Act, 1894, to certain plans for the construction of a certain portion of the work in reinforced concrete on condition (inter alia) that the work should be executed in accordance with the Concrete Regulations made under s. 23 of the London County

Council (General Powers) Act, 1909, and should be constructed to the satisfaction of the district surveyor. Similarly after the Act of 1930 came into force the two consents of March 21, 1931, and of November 3, 1931, may be taken as typical. The first of those consents approved certain plans subject to the work being executed in accordance with the standard attaining under the Third Schedule to the London Building Act, 1930. It is to be observed that such Third Schedule relates to buildings of metal skeleton construction and derives its force from s. 58 of the Act of 1930. So also the second of these consents (November 3, 1931) approved plans on condition that the work should be executed in accordance with the London County Council's Reinforced Concrete Regulations to the satisfaction of the district surveyor. It is to be observed that at this date the Reinforced Concrete Regulations were made under s. 59 of the Act of 1930 and derived their force from that section.

It seems clear that until the Act of 1930 came into force the surveyor would have been entitled to fees for such work, and I understood counsel for the respondents to concede that such was the case. But it was contended that the effect of the new Act and of the Schedules which came into force on October 1, 1930 (s. 3 of the Act of 1930), was to take away any right to remuneration in the particular case—probably unintentionally but, of course, if the contention be sound, none the less effectually. Broadly stated, the view presented for the builders and adopted by the Divisional Court is that by Sch. V. of the Act of 1930, scales of fees are so classified that the work now under consideration falls into none of the classes and is therefore not to be remunerated on any scale.

The position under the earlier Acts seems to me to have been as follows: The Battersea Power Station was a building of reinforced concrete and metal skeleton construction. Under the Act of 1894, when such methods of construction were less usual, there were no detailed provisions specially relating to them. But s. 82 in Part VII. of the Act of 1894, corresponding to s. 89 of the 1930 Act, made provision for special buildings with specific mention of iron buildings, and s. 203 in Part XVI.

of the Act of 1894, corresponding to s. 227 of the Act of 1930, dealt with buildings for the supply of electricity and brought them within the category of special buildings. With regard to fees, there was no distinction between ordinary and special buildings such as those of iron or concrete and fees were payable by the builders under s. 154 of the Act of 1894, and the Third Schedule to that Act on one and the same scale irrespective of the nature of the building.

Speaking generally, the basis and method of graduating the charges was by the size of the buildings dealt with. The next material stage was reached by the passing of the London County Council (General Powers) Act, 1909. Part IV. of that Act was entitled "Amendment of London Building Acts." The sections in that part of the Act of most importance for the present purpose were:

Sect. 22. Provisions with respect to buildings of iron and steel skeleton construction. The section contained within itself some 35 regulations relating to the construction of such buildings and numbers 31, 32 and 33 laid down rules as to the part to be played by the district surveyor.

Sect. 23. Gave power to make regulations with respect to the construction of buildings wholly or partly of reinforced concrete.

Sect. 26. Provided that where under the foregoing provisions or any regulations thereunder any building was erected or work done the district surveyor was to have an increased fee equal to two and a half times what I have for the sake of brevity called the ordinary fee under the Third Schedule of the Act of 1894.

In July, 1915, Reinforced Concrete Regulations (133 in number) were made by the London County Council and allowed by the Local Government Board and regulation 168 dealt with the supervision of the construction of such a building by the district surveyor.

In 1928 there was passed the London County Council (General Powers) Act of that year (18 & 19 Geo. 5, ch. lxxvii.), for, amongst other purposes, amending the provisions of the Building Acts relating to the remuneration of district surveyors. Sect. 5 dealt with this matter and gives force to four Schedules dealing with and setting out various scales of fees and matters subsidiary thereto. This was the operative statute when the work now in question was begun, and I see no reason to doubt that Mr. Lane would have been entitled under it to the remuneration now in question.

So matters stood until the Act of 1930 came into force, and as I have already stated, up to that point the right of the district surveyor to remuneration in circumstances such as the present would seem to be indisputable and undisputed.

The Act of 1930 repealed amongst other enactments the whole of the Act of 1894 and Part IV. of the Act of 1909. But s. 22 of the latter Act was re-enacted in Part VI. of the Act of 1930 and was represented by s. 58 of the new Act, with this difference, that whilst the more general of the 35 regulations in s. 22 of the 1909 Act, including those as to district surveyors, stood part of s. 58 of the new Act, the detailed regulations as to construction were relegated to a Schedule to which force was given by s. 58 and which was numbered as the Third Schedule of the Act of 1930. Similarly s. 23 of the Act of 1909 was represented by s. 59 of the new Act dealing with reinforced concrete and containing similar provisions and giving effect to the Reinforced Concrete Regulations.

Sect. 26 of the 1909 Act, providing for the increased fees to the surveyor, found its place in a different part (Part XIV.) of the Act of 1930 and is represented in s. 173 of that Act, and in the Fifth Schedule of that Act, which took the place of the Third Schedule of the Act of 1894. The methods of calculating the higher scale of fees in the new Schedule are more elaborate than in s. 26 of the Act of 1909, but it seems to be common ground that the effect is to provide for fees two and a half times as large as the ordinary fees.

The question remains, is the district surveyor entitled on the true construction of the Act of 1930 to any fees? In my opinion he is entitled to fees on the higher scale, but he is contented with fees equivalent to those to which he would have been entitled under the lower scale, and the magistrate's decision that he is entitled to them is, in my opinion, correct.

The surveyor was, I conceive, entitled to abate his charges, and it is immaterial whether he did so because in the circumstances he thought that such abatement was just or because in a disputable matter he thought prudent moderation would secure acceptance of a proffered concession.

The reasons for my opinion are those stated in the judgments of Greer L.J., which I have had the advantage of reading, but I may summarize my conclusions as follows: First, as to s. 227. The kernel of the judgment of the Divisional Court is that the words "general provisions of Parts V., VI. and VII. of the Act," means all the provisions of those parts of the Act. I am unable to agree with this view. Sect. 227 occurs in a group of sections beginning with s. 223 under the heading "Application of Act," and an examination of the sections under that heading tends in my view to a conclusion opposed to that of the Divisional Court. Thus s. 223 exempts certain specified buildings from the operation of Parts VI. and VII. of the Act without qualification. Sect. 224 states without qualification that the provisions of Part VIII. of the Act shall not apply to other specified buildings. Sects. 226 and 228 similarly provide without qualification for other exemptions. Further, with Greer and Maugham L.JJ. I attach the highest importance to the omission of the Third Schedule from the remuneration of the portions of the Act which are not to apply. I cannot regard such omission as likely to be accidental where there was an apparently carefully framed arrangement of matter old and new to constitute a revised set of Schedules. Even if it were otherwise, the omission of Sch. III. should be given effect to, and the conclusion seems to me to be inevitable that the section from which Sch. III. derives its force is a section which applies. I observe in this connection that ss. 58 and 59 seem to me not to be or to contain general provisions but to be or contain special provisions for special classes of buildings.

Next as to s. 173, sub-s. 2, of the Act. In my opinion the building now in question was erected under the provisions of ss. 58 and 59 of the Act. That it was in fact so erected or that at any rate the London County Council required it to be so erected seems to me to be clear from the terms of the consents and the facts found in the case. I am unable to find any power in the London County Council apart from ss. 58 and 59 to impose the conditions contained in the consents and still less power to set the district surveyor to work and ex hypothesi to work without remuneration in seeing that their conditions were complied with. Indeed, on this hypothesis I fear that Mr. Lane was acting illegally in that he was doing private work where he clearly had some official duties to perform. Such a situation is dealt with and such combination of private and official practice forbidden by s. 160 of the Act of 1930. I am further of opinion that in law as well as in fact the building was erected under the provisions of ss. 58 and 59 of the Act. The word "under" is capable of two meanings. It may mean "by virtue of powers" granted to the building owners by their constitution or by Act of Parliament. In that sense these buildings were doubtless erected under some Act quite other than the Act of 1930. In another sense "under" means "subject to the provisions of" and that is the sense in which, in my judgment, the word "under" is used in s. 173, sub-s. 2, of this Act. Adopting this view, this building was in a sense erected under s. 227, but since for the reasons I have already given I think that buildings erected under s. 227 are subject to the provisions of ss. 58 and 59 the building was in my opinion erected under ss. 58 and 59.

It follows from this reasoning, if it be sound, that Sch. V., Part IV., applies to this building, or rather to the work of Mr. Lane done in connection with its erection. For these reasons I am of opinion that the appeal should be allowed. There is, however, one further matter I desire to deal with.

Holding the view I do as to the construction of the statute, it is unnecessary to decide upon an alternative contention for the appellant discussed during the argument—namely, whether if the view I have adopted were wrong and the surveyor were not entitled to the larger fee he is deprived of all remuneration or is entitled to be paid on the ordinary scale under s. 173, sub-s. 1, of the Act. That would depend

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upon the true construction of Part III. (*b*) of the Fifth Schedule. Be it assumed for the consideration of this point that this building is exempt by s. 227 from all the provisions of Parts VI. and VII. of the Act, including those of ss. 58 and 59. I observe that the words in the Schedule are "the provisions," not "the general provisions," as in s. 227. The question would remain: Is this also a building referred to in heading (*a*) of Part IV. of this Schedule? The finding in (*j*) of the case that the building is of the type described in Part IV. (*a*) of the Fifth Schedule hardly seems to me to dispose of the matter. I should venture to think it a possible and indeed the natural construction of the words "buildings referred to in heading (*a*)," that this heading or head which, though rather long, contains only one sentence, is to be read as including everything down to or including the provisions as to fees. If so, the expression refers to buildings which, besides being of a certain type, are also subject to the regulations as to fees laid down in that heading of the Schedule. In simple language it means that the ordinary rate of fee is to be paid unless the building is a building to which, under heading (*a*) of Part IV., the higher rate of charge is made applicable. It is to be noted that this view would justify the amount sought to be recovered by Mr. Lane in the present case. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *C. V. Young & Cowper.*
Solicitor for respondents: *A. C. Giles.*

R. F. S.

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Gaming—Lottery—Scheme for sale of note cases—Buyer entitled to commission on sales by himself and by successive sub-buyers—Commission depending mainly on chance—Lotteries Act, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41—*Vagrancy Act,* 1824 (5 *Geo.* 4, *c.* 83), *ss.* 4, 21.

A company, having bought a quantity of note cases at a price of less than 1*s.* 6*d.* each, devised a scheme for selling them at a profit, and issued to the public a leaflet in accordance with the terms of which the scheme was conducted. The leaflet informed a person desirous of participating in the scheme that on filling up and sending in an attached order form together with 1*l.* there would be sent to him a note case and a supply of the leaflets the order forms of which would be marked with a number allotted to him; that he should get other persons to give orders for note cases, using these forms; that he would be entitled to no benefit from the first three of these orders, but would be paid a commission of 10*s.* on every other order received on his forms and on sales made as a result of these orders; that whenever an order was received on one of his forms, after the first three, a supply of forms also marked with his number would be sent to the buyer, and that the participant would be paid a commission of 10*s.* on each of the first three sales made by every one to whom one of the forms so numbered was sent; and that there was no time limit to the scheme, but that the maximum commission payable to a participant was 20,000*l.*:—

Held, that, inasmuch as, with the exception of commissions resulting from orders directly obtained by the participant himself, all the commissions which he received would result from orders given by persons over whom he had no control and would depend so far as he was concerned not upon his skill or work but upon pure chance, the scheme was a "lottery" within the meaning of the Lotteries Act, 1823, s. 41.

Barnes v. *Strathern,* 1929 J. C. 41 and *Howgate* v. *Ralph* (1929) 93 J. P. 127, approved and applied.

CASE stated by justices for the county of Worcester.

The respondents, Sidney Piers Victor Phillips and Pratton Bernard Thomas, were directors of the Farm and Road Engineering Company, Ld., of Pershore, in the county of Worcester. They were the only two directors of the company and they owned practically all its shares.

In March, 1932, the respondents originated a scheme, hereinafter called "the scheme," for the sale of leather note cases which they called "Swastika" note cases.

From March, 1932, until the date of the hearing before the justices which is mentioned below the scheme had been conducted in accordance with the terms of a printed leaflet entitled "Form A," and headed with the name of the above mentioned company. (1) Attached to the leaflet was an order

(1) The leaflet, so far as material, was as follows :—

"Form A.

The Farm and Road Engineering Co. Ltd.

. . . .

Dear Sir, or Madam,

This is not a snowball or a competition, but a method by which you can earn any sum up to £20,000 in return for a few hours' work.

We ask you to buy one of our swastika note cases for £1 and get at least four of your friends to order these cases on the forms we shall send you.

In return for this we offer you commission up to a maximum of £20,000.

. . . .

Should you decide to take part in our sales scheme you are sure to find some people who will tell you that it must be impracticable or fraudulent. We do not want you to be discouraged by this. Any accountant will tell you that the scheme is mathematically sound and quite practicable.

. . . .

We hope you will be convinced that our sales scheme is a sound investment and worth a £1 of your money and a little of your time.

Should you decide to enter, any help we can give you is always at your disposal.

Yours faithfully,

The Farm & Road Engineering Co., Ltd.

Instructions.

1. Fill in your name and address on order form and post us this leaflet together with remittance of £1.

2. We will then send you your note case and a supply of these leaflets, the order forms of which will be marked with a registered number which we shall allot exclusively to you. Make a careful note of this number.

3. Get as many of your friends as you can (who wish to join in this scheme) to order cases from us, using the forms we send you.

4. You will be entitled to no benefit from the first three orders sent, but we shall pay you a commission of 10*s*. on every other order received on your forms and on sales we make as a result of these orders.

5. This will be carried out as follows :—

Whenever we receive an order on one of your numbered forms (after the first three), we shall send a supply of forms also marked with your number, to the purchaser, and shall pay you a commission of 10*s*. on each of the first three sales made by everyone to whom we send your numbered forms.

6. By this method your commission payments will grow very rapidly, even if you only sell one note case in addition to your first three.

form to be filled up by a person desirous of taking part in the scheme.

At first the scheme was conducted by the respondents for and in the name of the company, but in November, 1932,

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Rules.

1. Everyone who buys a note case will be sent a supply of these leaflets and allotted a registered number. After selling three cases they will be entitled to commission as described in this leaflet.

2. The maximum commission payable to the purchaser of a note case is £20,000.

. . . .

7. Orders may be cancelled within 7 days. If note case is returned in good condition within that period, money will be refunded in full without question.

8. No commission will be paid on cancelled orders.

"*Description of System.*

. . . .

You draw no commission on your first three sales or on any sales resulting. . . . .

The commission on these sales goes to whoever sold the note case to you; unless the sale was one of his or her first three, when it goes to a previous entrant.

You draw commission on your fourth and all subsequent direct sales and on sales resulting as described in this leaflet. For example: If your fourth sale is to A, you draw 10*s.* (ten shillings) commission. A sells to B, C and D, and you draw ten shillings commission on each of these sales, B, C, and D sell to E, F, G, H, I. J, K, L, and M, and you draw ten shillings commission on each of these sales. You draw ten shillings commission on each of the first three sales made by E to M, and so on."

An instance was then given showing how the cumulative commission payments worked out from the 1st stage to the 8th stage.

"You will see that in the above instance we have assumed that all who buy one note case sell at least three each, as agreed.

In this case you would draw the maximum commission of £20,000 within eleven months, allowing one month for each sale.

Of course this is hardly likely to occur, and here is where the great difference lies between our plan of payment and the 'snowball.'

Even if a large proportion of those who enter fail to sell any note cases, your chance of drawing the maximum commission is in no way spoilt. You will still receive your payments regularly but they will be smaller.

In fact, so long as a single person concerned in your series of sales continues to sell, your chance still holds good. If you find that your commission payments are not as large as you would like, you can always speed matters up by selling a few more note cases yourself. A fresh supply of order forms will be sent to you on application."

. . . .

"The following are replies to questions which we are frequently asked . . . .

1. There is no time limit to our sales scheme, which we propose to carry on indefinitely.

2. A list of all your direct sales will always be sent to you on request.

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a new company, the Swastika Sales (England), Ld., was formed by the respondents, the respondents stating in a circular that the scheme had become too large to be dealt with by the original company. The respondents were the only directors of the new company and they held all its shares. No change in the conduct of the scheme was made by the formation of the new company.

The note cases which were sold by means of the scheme were purchased by the respondents at a price of 17*s.* 9*d.* a dozen.

From March, 1932, until September 23, 1932, note cases to the number of 7416 had been sold in accordance with the scheme. By June, 1933, the sale of note cases had dropped by approximately 70 per cent. from the figure reached when the scheme was at its zenith. At that date about twenty-five note cases a week were being sold to persons in the British Isles. Sales of the note cases were also being made to persons resident in the British Colonies, France, Germany, Holland and Belgium, and a few to persons resident in Switzerland. According to the respondent Thomas " the South American Business had petered out." The scheme was still being carried on at the date of the hearing before the justices.

All the sales of note cases were carried out in accordance with the terms of the scheme as described in the leaflet " Form A." On the instructions of the respondents large numbers of these leaflets were printed in English, and also

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3. In compliance with the Companies Act, 1929, our records are periodically examined by the Company's Auditor, who will upon payment of a nominal fee arrange for the audit of your commission account, and furnish a certificate accordingly."

. . . .

" *Order Form.*

To the Farm & Road Engineering Co. Ltd.

. . . .

Sold by [Name_______________]

Registered No.________________

Please supply one note case. I enclose £1 in payment and addressed envelope. This order is given on the understanding that after I have sold three note cases I shall be entitled to commission as detailed in your leaflet.

Send me____________________ leaflets [State how many are required].

From { Name____________________
From { Address__________________

_________________________ "

in the French, German, Italian, Spanish, Dutch and Chinese languages, and these were despatched daily to persons resident in various countries as applications were received. All the leaflets were despatched direct from Pershore, and the respondents had no agents abroad, except in so far as the purchasers of the note cases automatically became agents for the scheme.

When the scheme first originated, fourteen clerks were employed in performing clerical work in connection with it. This number rose to sixteen, but by June, 1933, had dropped to ten.

From June, 1932, to June, 1933, an undergraduate at Oxford drew about 500*l.* in commission from the scheme in accordance with the terms of the leaflet.

The scheme was conducted by the respondents honestly in accordance with the terms of the leaflet, and none of the purchasers of the note cases had made any complaints. The respondents caused to be published and circulated two lists of the names of prominent English and foreign supporters of the scheme.

It was admitted that if the scheme amounted in law to an unlawful scheme for the sale of chances in a lottery, the respondents were guilty of offences upon the various dates mentioned in the informations.

Six informations were preferred by the Director of Public Prosecutions (hereinafter called "the appellant") under s. 41 of the Lotteries Act, 1823 (1), and ss. 4 and 21 of the Vagrancy Act, 1824, against the respondents for that they at Pershore on June 21, 1933, September 25, 1933, and October 24, 1933,

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(1) Lotteries Act, 1823, s. 41: "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries . . . . except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid, ... such person or persons shall for every such offence forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond or rogues and vagabonds, and shall be punished as such. . . . ."

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did unlawfully publish a scheme for the sale of chances in a lottery not authorized by any Act, contrary to the sections above mentioned.

On December 21, 1933, the informations were heard by the justices.

At the hearing of the informations the above mentioned facts were proved or admitted.

On the part of the appellant it was contended that the scheme was an unlawful scheme for the sale of chances in a lottery, and that therefore the respondents were guilty upon the informations.

On the part of the respondents it was contended: (*a*) That the scheme was not a lottery. (*b*) That there was no evidence that the scheme was a lottery. (*c*) That the facts set out in regard to the carrying on of the scheme were irrelevant.

The justices accepted the contentions of the respondents and dismissed the informations.

The question for the Court was whether, upon the above statement of facts, the justices came to a correct determination in law, and, if not, what should be done in the premises.

G. D. Roberts for the Director of Public Prosecutions, appellant. The justices were wrong in holding that the scheme in question was not a "lottery" within the meaning of the Lotteries Act, 1823, and the Vagrancy Act, 1824. That term is used in these Acts in its ordinary meaning, which in Webster's Dictionary is stated to be "A distribution of prizes by lot or chance." This scheme comes within that definition. It offers to those taking part in it a distribution of prizes or rewards of 10*s.* each which may be of great aggregate value, amounting even to 20,000*l.* In the next place the number and distribution of these prizes is determined by chance. A participator paying his 1*l.* for a note case no doubt receives for that payment some consideration which is not dependent upon chance. He receives a note case the true value of which is less than 1*s.* 6*d.*, and if he succeeds in finding three other buyers of note cases he also receives a first payment of 10*s.* which he admittedly earns by his own labour and skill. But these considerations together are of less value than the 1*l.* which has been paid and would be insufficient of themselves to induce any one to participate in the scheme. The real allurement to the participator is the prospect of obtaining in addition to the first payment of 10*s.* many other sums of 10*s.* amounting in all to perhaps 20,000*l.*, the obtaining of which is dependent upon pure chance. The respondents have endeavoured to give the scheme the appearance of a mercantile transaction by promising to pay to the participator a "commission . . . . on sales" made as the result of orders received, but in substance it lacks the certainty of a commercial enterprise and is a mere speculation. In the case of *Barnes* v. *Strathern* (1) the promoters of a scheme of this kind made an offer that a person should buy a bond for 1*s.* and then for 3*s.* four other bonds each of which he should sell to other persons, that each of these four persons should repeat the same process, that when a certain number of bonds had been sold, the holder of the parent bond should become entitled to 150*l.*, and that on the continuation of the process any other bond which became the parent of the specified number of bonds should also entitle its holder to a similar sum. In that case the Court held that the scheme was a lottery, inasmuch as the event upon which payment was to be made could neither be predicted nor materially influenced by any knowledge or skill on the part of the holder of the parent bond; and with even better reason should this scheme be held to be a lottery in which the respondents offer to a participant not one prize only but a large number of prizes of 10*s.* each, all of them dependent upon chance. A scheme of this kind is none the less a lottery because the prizes or rewards are of definite value, or because they depend on chance in so far only as the buyer or participator is concerned: *Howgate* v. *Ralph.* (2)

G. O. Slade for the respondents. The justices were right in holding that this scheme was not a lottery. There is no statutory definition of the term "lottery," but the respondents accept the definition given in Webster's Dictionary—namely, that it means a distribution of prizes by lot or chance. This

(1) 1929 J. C. 41.

(2) (1929) 93 J. P. 127.

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scheme does not come within either part of that definition. In the first place there is not here any distribution of prizes. The word "prize" connotes not only a reward, but a reward which is competed for by more than one person. Here the rewards or commissions of 10*s*. each are not competed for by more than one person, but each participator earns his own commissions independently of every other competitor. The mere fact that the commission may have been erroneously called a prize when it is not, cannot convert it into a prize and make the scheme illegal. In the next place, the rewards or commissions are not here distributed by lot or chance. The expression "distribution by chance" means that there is chance or uncertainty in regard to the destination of the prize or reward as well as in regard to its value. If there is no uncertainty as to the destination of the reward, mere uncertainty as to its amount does not make the scheme a lottery. In this scheme there is no uncertainty as to the destination of the commissions but only as to their total amount, which depends upon the number of note cases sold by means of the participator's forms, and for that reason the scheme is not a lottery. Further, the rewards or commissions are not here distributed by lot or chance, or at least not so entirely by lot or chance as to make the scheme a lottery, because the obtaining of them depends to some extent upon work and skill. The participator does not become entitled to even the first 10*s*. commission until he has found, in addition to himself, three other buyers of note cases, to find whom requires some effort and skill on his part, and as any subsequent commissions which he may obtain are obtained through these three buyers these other commissions also are obtained to some extent by his work and skill. A scheme which involves some degree of skill, even if it be a competition, is not a lottery: *Scott* v. *Director of Public Prosecutions*. (1) There are many businesses similar to this scheme, but none of them has ever been regarded as a lottery. For instance, the proprietor of a patent medicine appoints agents for its sale who in their turn appoint sub-agents throughout the country, or the world, and pays

(1) [1914] 2 K. B. 868.

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to each agent a commission on each quantity sold by one of his sub-agents though the agent himself may have done nothing towards effecting the sale. Similarly, the owner of the copyright of a book may appoint an agent for its sale who appoints sub-agents, and may pay the agent a commission on each copy sold by a sub-agent. The main feature of this scheme is the appointment of an agent on certain terms for the sale of a note case with the opportunity of getting commissions on sub-sales. It secures the appointment of an agent who sets the process of selling in motion, and then, without further exertion on his part, collects commissions on sub-sales effected through him, but in these respects it does not differ essentially from many legal forms of trading. The cases cited on behalf of the appellant are the only cases which bear any resemblance to the present. This case is distinguishable because there was here no such pronounced element of fortuity as existed in those cases. There is no reported case in which it has been held that a person selling goods on such terms as those on which these note cases were sold by the respondents has committed the offence of conducting a lottery or any offence.

G. D. Roberts in reply. The scheme involves the publication of an offer of prizes, and an invitation to compete for them. It differs entirely from the business of a merchant selling his wares through agents without any offer of prizes or invitation to compete for them. Further, the element of skill, if it exists here at all, is negligible in comparison with the element of chance.

LORD HEWART C.J. I am clearly of opinion that this appeal ought to be allowed. The case was that six informations were preferred by the Director of Public Prosecutions under s. 41 of the Lotteries Act, 1823, and s. 4 and s. 21 of the Vagrancy Act, 1824, against the present respondents for that they at a certain place and at certain times unlawfully published a scheme for the sale of chances in a lottery not authorized by any Act of Parliament. The justices having heard the informations dismissed them, and the

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question for us is whether upon the facts of this case it was open to the justices to dismiss the informations in law.

In regard to cases of this nature—I do not mean of this particular species only, but of this genus—one may quote the words of the Lord Justice General in *Barnes* v. *Strathern* (1): " There is no limit to the ingenuity of the devisers of projects such as this, and there is, accordingly, no end to the variety of schemes which may constitute a lottery." (2) It may well be, as Mr. Slade in his able argument has contended, that there is no case exactly on all fours with this case in its detail, but the principle involved is, I think, familiar. The Court has to disengage, if it can, the reality of the transaction from the appearance which for obvious reasons it is made to assume, and when one reads this document headed " The Farm and Road Engineering Company, Ltd.," it is, I think, perfectly clear that the real consideration for the sum of 1*l.* which the recipient of the leaflet is invited to part with is not the note case of the price of 1*s.* 6*d.* or thereabouts, but is, as appears to be frankly conceded, the prospect that by laying down that sum of 1*l.* upon the terms set out in this leaflet he may find himself the possessor of a sum varying from 10*s.* up to a maximum of 20,000*l.* In my opinion, this was not a commercial transaction. The object of the seller and the object of the buyer were not concerned with note cases. They were concerned with the chance which the buyer might procure of obtaining a large sum of money by the operation of persons over whom he had no more control than he has over " the countless laughter of the sea "(3), which does not laugh when the sun is not shining. If this transaction had been, or could reasonably be regarded as, a commercial transaction, it may be that other considerations might apply; but wherever one looks in this undoubtedly ingenious scheme one finds it impossible to discover anything of a really commercial nature. What one finds everywhere is the chance of drawing a large sum of money of which the maximum in any particular case is 20,000*l.* It seems to me that the case is in principle very

(1) 1929 J. C. 41.

(2) Ibid. 46.

(3) Aeschylus, Prom. 89, 90.

similar to, though in detail of course different from, the case of *Barnes* v. *Strathern* (1), to which our attention has been directed. I need not re-read the judgments of the learned judges of the Court of Session in Scotland in that case. They are not, of course, binding upon this Court, but they are extremely helpful, and, mutatis mutandis, it seems to me that the reasoning in all the judgments in that case is illuminating upon the true nature of this case. I think also that the decision of this Court to which our attention has been directed in *Howgate* v. *Ralph* (2) throws a light upon this matter.

What is it that is being done? There is here the publication of a scheme. What is the nature of that scheme? Is it not a scheme in the words, cited from Webster's Dictionary and approved by Hawkins J. in the well known case of *Taylor* v. *Smetten* (3), for the "distribution of prizes by lot or chance"? There is no magic in the word "distribution." The word "payment" will do just as well. There is no magic in the word "prizes." "Commission" or "reward" will do just as well. Here, as it seems to me, it is quite obvious that the person who accepts the invitation contained in this leaflet is paying the sum of 1*l*. in order that he may have the opportunity of setting a ball rolling, over whose revolutions, after the first four at any rate, he will have no control, and it is a pure matter of chance whether the return upon his money will prove to be a few shillings or a great many pounds.

I need not elaborate the matter. I think that this leaflet speaks for itself, and has the word "lottery" written all over it. I entirely agree with the argument which we have heard from Mr. Roberts, and in my opinion this appeal ought to be allowed.

BRANSON J. I agree. The scheme is dressed in the guise of a commercial transaction in which the respondents, desiring to sell note cases, are seeking to induce people to become customers by offering them lucrative commissions if they will buy and undertake to induce others to buy these articles.

(1) 1929 J. C. 41.
(2) 93 J. P. 127.
(3) (1883) 11 Q. B. D. 207.

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If that had been the real nature of the scheme the position would have been very different from what it is. As my Lord has said, one has only to consider the detail of the scheme to see that that is not its true nature. What a person is buying when he pays 1*l*. for one of these note cases is not a note case. He would not pay 1*l*., and the respondents would not ask him to pay 1*l*., for that only. He pays that 1*l*. in order to participate in this scheme, which it is hoped will sooner or later result in the collection from the public of large sums of money to be shared among those who have obtained participation by purchasing these note cases in amounts dependent entirely upon chance, for they depend upon the actions of persons in the lines of descent from the buyers, over whose actions the buyers themselves have no control at all.

I think, therefore, that this case comes within the principle of the cases which have been cited, and that this appeal should be allowed.

DU PARCQ J. I agree. The question is whether the justices ought to have convicted the defendants, who were charged in an information, which followed the words of s. 41 of the Lotteries Act, 1823, with having unlawfully published a scheme for the sale of chances in a lottery. Looking at those words, and remembering the definition of "lottery" which has been referred to many times during this case, I think that what the defendants did according to the facts found by the justices falls precisely within them. The justices have found that the scheme was conducted by the defendants honestly, and that none of the purchasers of the note cases made any complaint. I think that it is perfectly plain from that, first, that the defendants never pretended that the note cases that they sold were worth anything like 1*l*. each, and, secondly, that no buyer was ever deceived into thinking that the note cases were worth anything like 1*l*. Mr. Slade indeed very frankly said that 1*l*. would not be paid for the note case alone. A large part of the 1*l*., and certainly the greater part of it, was paid for a right which was to accrue to the purchaser after he had himself disposed of a certain number of note cases. That was a right to receive sums of money which might be very small or which might in certain conceivable cases amount to 20,000*l*., or even more than 20,000*l*. upon one construction of this offer. In my view, it is plain that the right, as I have called it, which was given to the buyer was in truth a right to the chance of obtaining a rich reward, and that it did not lie in his own hands to do anything to determine the question whether he would receive any great sum. Just as in the Scottish case of *Barnes* v. *Strathern* (1) to which we have been referred, so here, the event was in the realm of chance. I cannot think that any person acquainted with business, reading this special case, would say that this was a commercial transaction, and that the bargain contemplated by the scheme was an agreement between the parties under which commission for work and labour done was to be paid. It seems to me quite impossible to hold that it is an agreement of that kind, and, if it is not, then I find it difficult to see how it can be contended, notwithstanding Mr. Slade's very able argument, that this is anything but the sale of a chance in a lottery, within the meaning of the decided cases. I therefore agree with the judgments of my Lord and of my Brother.

LORD HEWART C.J. The appeal is allowed, and the cases will be remitted to the justices with a direction to find the offences proved and to assess the proper penalty.

Appeal allowed. Cases remitted.

NOTE.

On 16 November, 1934, and therefore since the date of this case, the Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58), has been passed, s. 21 of which provides that, subject to the provisions of the Act, all lotteries are unlawful.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Williamson, Hill & Co., for Russell & Co., Malvern.*

J. R.

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(1) 1929 J. C. 41.

1934
Nov. 16.

HIS MAJESTY'S POSTMASTER-GENERAL *v.* BIRMINGHAM CORPORATION.

[1934. P. 1557.]

Telegraph—Postmaster General—Town Planning Scheme—Municipal undertaking—Street level—Alteration—Expenses—Telegraph Act, 1863 (26 *&* 27 *Vict. c.* 112), *s.* 15—*Telegraph Act,* 1878 (41 *&* 42 *Vict. c.* 76), *ss.* 2, 7.

The Telegraph Act, 1878, s. 7, provides that "where any work proposed to be done in the execution of an undertaking authorised, by an Act of Parliament involves . . . . an alteration . . . . in any telegraphic line of the Postmaster General, and provision is not otherwise made by enactment, agreement, or otherwise with respect to such alteration" then (upon notice being given) the undertakers shall pay all the expenses incurred.

In pursuance of an approved scheme under the Housing and Town Planning Acts, 1909 and 1919, the Birmingham Corporation widened certain streets and altered the line or level thereof. In so doing they altered the telegraphic line. Upon a case stated the question was raised whether the Postmaster-General or the Corporation should pay the expenses of altering the telegraphic lines:—

Held, that the work had been carried out in conformity with a scheme under the Town Planning Acts, but that provision had been "otherwise made . . . . with respect to such alteration," by the Telegraph Act, 1863, s. 15, and that the expenses were payable by the Postmaster-General under that section and not by the Corporation under the Telegraph Act, 1878, s. 7.

The word "enactment" in s. 7 is not confined to the particular enactment which authorizes the alteration, but includes general Acts of Parliament.

SPECIAL CASE.

This case raised the question whether the plaintiff or the defendants in the action were liable to bear the expense of alterations to telegraphic lines in connection with a town planning scheme in the Birmingham district, having regard to the provisions of the Telegraph Act, 1863, s. 15, and the Telegraph Act, 1878, s. 7. (1) The action was begun by writ

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(1) The Telegraph Act, 1863, provides as follows:—

"Sect. 15. In case the body having the control of any street or public road at any time hereafter resolves to alter the line or level of any portion of such street or road under, in, upon, over, along, or across which any work of the company constructed either

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dated July 12, 1934, and the amount claimed was 916*l.* 15*s.* 9*d.* The point of law was then referred to the Court for decision upon a case stated by counsel. This case, so far as material, was as follows:—

The Birmingham (South) Town Planning Scheme was approved by the Minister of Health pursuant to the provisions of Housing and Town Planning Acts, 1909 and 1919, and came into operation on March 27, 1925. The Quinton, Harborne and Edgbaston Town Planning Scheme was approved by the President of the Local Government Board pursuant to the Housing and Town Planning Act, 1909, and came into operation on May 31, 1913.

The schemes contain provisions for the construction of certain new streets and the widening of certain existing streets as therein respectively provided. Since the schemes came into operation the defendants have widened certain existing streets and have constructed a certain new street, namely, road No. 16, as provided for in clause 4 of the Quinton, Harborne and Edgbaston Town Planning Scheme. Each of these widenings was carried out by them in pursuance of a resolution passed by the City Council of Birmingham to

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before or after the passing of this Act is placed, the company shall from time to time be bound, on receiving one month's notice of such intended alteration, and at their own expense, to remove such work, and to replace the same in such position and manner in all respects as may be required by such body, or, in the event of difference between such body and the company, in such position and manner in all respects as may be determined . . . . by two justices . . . . "

It was agreed that the plaintiff occupied the position of the company for the purposes of the above section.

The Telegraph Act, 1878, provides: –

"Sect. 7. Where any work proposed to be done in the execution of an undertaking authorized by an Act of Parliament involves or is likely to involve an alteration either temporarily or permanently in any telegraphic line of the Postmaster General, and provision is not otherwise made by enactment, agreement, or otherwise with respect to such alteration or to giving notice to the Postmaster General thereof or to the expenses of or incidental thereto, the following enactments shall apply, *i.e.*—

Sub-ss. 3 and 4 of s. 7, then provide that the Postmaster-General may either make the alterations at the expense of the undertakers, or may require the undertakers to make them at their own expense.

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carry out the work and in conformity with and for the purpose of carrying into effect the Birmingham (South) Town Planning Scheme; but the defendants had power to carry out such widenings apart from the provisions of the scheme under the Birmingham Corporation (Consolidation) Act, 1883, the Highways Act, 1835, and the Public Health Act, 1875, and contend that they would have had power to do so apart from the provisions of the scheme under the Development and Road Improvement Funds Act, 1909, and the Housing and Town Planning Acts, 1909 and 1919.

The construction of the new street was carried out by the defendants in pursuance of a resolution passed by the City Council of Birmingham to carry out the work, and in conformity with and for the purpose of carrying into effect the Quinton, Harborne and Edgbaston Town Planning Scheme. The defendants had power to construct this new street and for that purpose to alter the line or level of the existing road apart from the provisions of the said scheme under the Birmingham Corporation (Consolidation) Act, 1883, the Highways Act, 1835, and the Public Health Act, 1875, and contend that they would have had power to do so apart from the provisions of the scheme under the Development and Road Improvement Funds Act, 1909, and the Housing and Town Planning Acts, 1909 and 1919. Each of the widenings mentioned above and the construction of the new street necessitated the alteration of the line or level and in some cases of the line and level of some portion of an existing street or public road under the control of the defendants and involved an alteration in telegraphic lines vested in the plaintiff which were situate under, in, upon, over, along, or across such portion of such existing street or road. A dispute having arisen between the parties whether the expenses of and incidental to the alteration of these telegraphic lines should be borne by the defendants pursuant to the Telegraph Act, 1878, s. 7, or by the plaintiff pursuant to the Telegraph Act, 1863, s. 15, it was agreed between the parties that in order to avoid delay the alterations should be carried out by the plaintiff, and the defendants should undertake to pay to the plaintiff all expenses of and incidental to the alterations of the telegraphic lines, unless they should be able to establish that they were entitled to require the plaintiff to carry them out at his own expense. The defendants accordingly executed under their common seal and delivered to the plaintiff undertakings in writing, and the plaintiff carried out the alterations in the telegraphic lines referred to at a total cost of 916*l.* 15*s.* 9*d.*, of which the sum of 889*l.* 19*s.* 4*d.* was the cost of the alterations involved by the street widenings, and 26*l.* 16*s.* 5*d.* was the cost of the alterations involved by the construction of the new street.

The question for the opinion of the Court was whether, if no such undertakings as aforesaid had been given by the defendants, the defendants would have been entitled to require the plaintiff to carry out the alterations to telegraphic lines at his own expense having regard to the provisions of the Telegraph Act, 1863, s. 15, and of the Telegraph Act, 1878, s. 7.

Sir Thomas Inskip A.-G. and *Harold Murphy* for the Postmaster-General. The Telegraph Act, 1878 (1), contains the code now applicable where works are to be executed by the undertakers which have been approved by Act of Parliament and involve an alteration in the telegraphic line. By s. 7 the undertakers are made responsible in such case for the expenses incurred and must pay the same to the Postmaster-General. This covers road works under an approved town planning scheme and (s. 2) the expression "undertaking" means "the works or undertaking of whatever nature the execution of which is authorised by an Act of Parliament," as therein defined. It is true that the earlier part of s. 7 refers to an undertaking authorized by an Act of Parliament, but when the section goes on to say " and provision is not otherwise made by enactment, agreement, or otherwise " the particular enactment which deals with the specific alteration and works authorized is indicated. Unless such provision is made in the particular enactment, the undertakers, that is, the Corporation, are liable for the expenses. This construction receives support from the marginal note to s. 7, which speaks of " special " Acts of Parliament.

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(1) The Telegraph Act, 1878, s. 2, defines the expression "Act of Parliament" as meaning "any Act of Parliament whether public general, local and personal, or private, and includes the order confirmed by any such Act. . . ." The expression "undertaking" is defined as meaning "the works or undertaking of whatever nature the execution of which is authorised by an Act of Parliament as above defined."

The Act of 1863 was an Act giving general powers—a " Clauses " Act—and was not an enactment making provision " with respect to such alteration " of the kind referred to in the proviso to the Act of 1878, s. 7. The effect of s. 7 is not to leave s. 15 of the Act of 1863 in the air ; s. 15 still applies where the local highway authority resolves to exercise its general powers under the Highways Act. Then the highway authority can call upon the owners of the telegraph lines, formerly the Companies, now the Postmaster-General, to move them at the expense of the latter. But s. 15 does not apply where the authority are altering the level of the street in consequence of special statutory powers dealing with a particular undertaking. Apart from clause 50 (*b*) (1) of the Birmingham Scheme it is admitted that the removal or alteration of the telegraph line by the Corporation would not fall within s. 7, because that would not involve the execution of work authorized by an Act of Parliament. The object of the draftsman was to render s. 7 applicable in circumstances to which it would not otherwise apply.

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(1) Clause 50 of the Birmingham (South) Town Planning Scheme was as follows :—

" (*a*) Nothing in this Scheme shall affect the application of section 7 of the Telegraph Act, 1878, to any alteration in any telegraphic line of the Postmaster-General which may be involved in the exercise of powers conferred by the Scheme.

(*b*) Notwithstanding the stopping up or diversion of any highway or footpath under this Scheme, the Postmaster-General shall continue to have the same powers and rights in regard to any telegraphic line which remains in, under, upon, over, along or across the site of the said highway or footpath as if the same had continued to be a highway or footpath :

Provided that if the Corporation or the person in whom the soil of the said highway or footpath is vested under this Scheme desires to alter such telegraphic line, the enactments of section 7 of the said Act shall thereupon apply in all respects as though the Corporation or the said person (as the case may be) were undertakers within the meaning of that Act.

(*c*) Expressions in this Clause have the same meaning as in the Telegraph Act, 1878."

Tyldesley Jones K.C. and *Trustram Eve* for the Corporation. The Telegraph Acts, 1868 and 1869, empowered the Postmaster-General to purchase telegraphic undertakings. Both those Acts recognize the Act of 1863 and incorporate it. The Act of 1868, s. 2, defines "undertaking," when referred to in the Act, as including any works authorized by any Act of Parliament. The powers of the highway authority (the surveyor, at common law) were to maintain, but not to improve the highway. General provision to this effect is made in the Public Health Act, 1875, s. 149, and when the highway authority seeks to alter the highway it must do so in pursuance of a general Act. Here the Act of 1863, s. 15, already makes "other provision" and that section in its opening words deals with proposed alterations in the line or level of a street, which can only be carried out by express statutory provision. Any enactment dealing with these matters is sufficient to exclude s. 7 of the Telegraph Act, 1878. The Postmaster-General may in placing telegraphs under streets or roads alter the position of gas or water pipes on paying the cost: see the Telegraph Act, 1863, s. 8, which applies the same general principles of compensation as are laid down by s. 7. Here the Corporation resolved to alter the line of the street in pursuance of a town planning scheme and therefore, provision being made by "enactment," the case is taken out of s. 7 of the Act of 1878 and falls within the Act of 1863, s. 15. Clause 50 of the Birmingham Scheme does not assist the Crown, so far as the application of the Act of 1878, s. 7, is concerned. A right cannot be raised out of a mere salvo or exception in an Act of Parliament: *Lord Advocate for Scotland* v. *Hamilton.* (1) Clause 50 (*a*) is of general application and not confined to the case of a highway authority, while, if the argument for the Crown is accepted, clause 50 (*b*) is unnecessary.

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(1) (1855) 1 Macq. H. L. 46.

Sir Thomas Inskip A.-G. in reply. "Enactment" in s. 7 of the Act of 1878 does not mean "general enactment," but *the* enactment or another enactment to be read with it, applicable to the alteration involved in the execution of the statutory undertaking.

GODDARD J. This case raises a difficult and important point.

It involves the construction of two sections in two Acts of Parliament: the Telegraph Act, 1863, s. 15, and the Telegraph Act, 1878, s. 7, and, as shown in the special case, the matter arises in this way. Two town planning schemes were made with regard to two different parts of Birmingham. These town planning schemes involved the widening of a considerable number of streets within the city and in one place the construction of a new road. That involves the alteration of the line and level of the streets and consequent interference with telegraph lines, the property of the Postmaster-General. The whole question is whether or not the cost of the alteration of the telegraph lines falls upon the Corporation as the undertakers of these new works, or whether it falls upon the Postmaster-General under the Act of 1863, whereby the Telegraph Companies had certain liabilities and duties imposed upon them, which liabilities and duties have become those of the Postmaster-General.

[His Lordship read s. 7 of the Act of 1878 and s. 15 of the Act of 1863 (1), and continued:] The argument for the Postmaster-General as advanced by the Attorney-General I can summarize in this way. He says that s. 15 of the Act of 1863 only applies where the local authority resolve to alter the line or level of the street in pursuance of their general powers conferred upon them by statute as highway authority and has no application to a case where the authority are altering the line or level of the street in consequence of special powers either conferred or imposed upon them by an Act of Parliament which deals with some special undertaking.

On the other hand it is contended for the Corporation that if the alteration in the telegraph line is caused by an alteration in the line or level of the street, then the cost falls upon the Postmaster-General and not upon the local authority, although any other alteration in the telegraph line caused by any means other than an alteration in the line or level will fall upon the undertakers. I have to determine between these two contentions as to the meaning of these two sections. In the Telegraph Act, 1878, " Act of Parliament " is defined as " any Act of Parliament whether public general, local and personal, or private," and therefore the work done need not be, as the marginal note to s. 7 suggests, work done in consequence of special Acts of Parliament, but may be work authorized by general Acts of Parliament. I have no doubt, although this does not conclude the matter, that the work which the Corporation are doing here and which they have decided by resolution to put in hand, is work authorized by the Housing and Town Planning Act and the schemes made thereunder. The Housing and Town Planning Acts are general Acts, the schemes being special schemes applicable to the particular districts. The work which is involved, the alteration of the telegraph lines in this particular case, is work authorized by Act of Parliament, and it does not matter whether the Acts are local Acts or special Acts or general Acts, the words of the section are wide enough to cover all Acts. I have to determine whether provision is " otherwise made " by Act of Parliament " with respect to such alteration." The argument of the Crown is that I must confine that to the enactment which authorizes the particular alterations or to some other enactment having special reference to those alterations. In spite of the powerful argument of the Attorney-General, I do not think that I should limit the meaning of the word " enactment " in the way that is suggested. It could have been made much more clear in the section if that had been the intention, and I think that the proviso in s. 7 means that if there is an enactment with respect to " such alteration "—that is to say, the alteration involved in the carrying out of this work—then that enactment is to apply and not s. 7; and, as this work alters the line or level of the portion of the street or road, I hold that it falls within s. 15. I did raise

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(1) Ante p. 404, note (1).

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a question at the end of the argument as to the exact resolution passed by the Corporation. I am bound by the case on that, but there is no doubt that the resolution is a resolution to carry out the work in conformity with or for the purpose of carrying into effect the Birmingham (South) Town Planning Scheme and the other scheme which is annexed to the case. In the course of carrying out that work they had to do certain widening of the streets, and in the course of such widening they made alterations in the lines of the streets. There is no question that the Corporation resolved to alter the level and line of the streets because they had resolved to carry out the widening. The work therefore comes within s. 15 and I must answer the question in favour of the defendants, for whom judgment will be entered accordingly.

Solicitors: *Sir Raymond W. Woods, Solicitor to H.M. Postmaster-General; Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

F. P. F.

C. A.

1934
Oct. 17, 18.

RAWLENCE AND SQUAREY *v.* SPICER.

WITHERS AND COMPANY *v.* SAME.

Ecclesiastical law—Tithe rentcharge—Order for recovery and enforcement by distress—Insufficient distress—Mistake as to value of goods seized—Alleged interference by distrainee—Application for second distress—Jurisdiction—Tithe Act, 1836 (6 & 7 *Will.* 4, *c.* 71), *s.* 81 *—Tithe Act,* 1891 (54 & 55 *Vict. c.* 8), *s.* 2; *s.* 10, *sub-s.* 2.

An order having been made by the county court directing the recovery from a landowner of a sum of about 30*l.* on account of tithe rentcharge and appointing an officer to distrain therefor, the officer seized three hayricks of the market value of 170*l.* By reason of a local agitation against tithes and of threats by the landowner a sale of the hayricks by auction could not be held. Under an order for sale by tender only two tenders were forthcoming, the higher being one of 10*l.* by the landowner himself which was accepted. An application by the parties entitled to the tithe rentcharge for an order for a second distress having been refused by the county court:—

Held, by the Court of Appeal, that the case was excepted from the general rule of law that a second distress cannot be made for the same sum, on either of these grounds :—

(1.) that the officer in levying the first distress had in the circumstances made a bona fide and excusable mistake in underestimating the true value of the hayricks seized :

Decision of Lord Mansfield in *Hutchins* v. *Chambers* (1758) 1 Burr. 579, 589 ; and observations of Parke B. in *Bagge* v. *Mawby* (1853) 8 Ex. 641, 648, approved and followed ;

(2.) that the misconduct of the landowner himself had contributed to prevent the first distress from being effective ;

Lee v. *Cooke* (1858) 3 H. & N. 203 ; and *Rex* v. *Judge Clements. Ex parte Ferridge* [1932] 2 K. B. 535, principle applied ;
and that the case should be remitted to the county court judge, who in the exercise of his judicial discretion should make such an order and, if necessary, give such further directions, as were in accordance with the principles of law which the Court had laid down.

Under s. 10, sub-s. 2, of the Tithe Act, 1891, the proceedings which are required to be commenced before the expiration of two years from the date at which the sum on account of tithe rentcharge became payable are the original proceedings for the recovery of that sum and not proceedings subsequently initiated by direction of the county court under s. 2, sub-s. 2, of the Act.

Quaere, whether the rules by which the Courts have limited the powers of distress in ordinary cases apply to a case of distress for tithe rentcharge under the Tithe Acts where the conduct of the distress is not left to the judgment or initiative of the titheowner, but has to be exercised at every stage under the directions of the county court.

TWO APPEALS from the County Court of Hampshire, sitting at Ringwood.

On October 1, 1931, there became payable in respect of tithe rentcharge for six months issuing out of lands known as Hyde Farm, Fordingbridge, Hampshire, of which Mr. T. Spicer, the respondent, was the owner and occupier, to the two following bodies as titheowners the two following sums, namely, to Queen Anne's Bounty 5*l*. 8*s*. 10*d*., and to King's College, Cambridge, 25*l*. 5*s*. 5*d*.

On April 4, 1932, Queen Anne's Bounty, by Messrs. Rawlence & Squarey, their agents, made an application to the county court under the Tithe Act, 1891, s. 2, that an order be made for the recovery of the former sum, which had not been paid, and that the order be executed by the appointment of an officer to distrain under the Tithe Act,

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1891, s. 2, sub-s. 2 (1); and on April 16, 1932, King's College, Cambridge, by Mr. P. H. Jackson, their solicitor, made a similar application for an order for recovery of the latter sum, which had not been paid, and for the execution thereof.

On April 22, 1932, the county court made an order granting the relief claimed by the first named applicants; and on June 13, 1932, a similar order in favour of the latter applicants. Mr. A. A. Bowes, the bailiff of the county court, was appointed to be the officer to distrain in both cases.

There was at this time a widespread agitation among farmers in Hampshire and adjoining counties against payment of tithes, and an organization called the Anti-Tithe Association had been formed with the object of securing their abolition.

On October 11, 1932, the officer appointed to distrain as aforesaid entered upon the lands and seized three hay ricks, the market value of which was appraised at about 170*l.* In the circumstances, the officer was unable to get any auctioneer to conduct the sale, and no sale by auction took place.

The officer thereupon applied to the county court judge for and obtained from him a direction to sell the ricks by tender. On tenders being invited in the ordinary way none were forthcoming. Only two tenders were received, the higher being one by the respondent himself of 10*l.*, which was accepted. The costs of the distress, however, amounted to 13*l.* 9*s.* 4*d.*, for which the applicants as titheowners were liable, so that they not only got nothing by the distress but had to pay their respective proportions of 3*l.* 9*s.* 4*d.* excess costs.

On November 22, 1933, an application in the nature of an application for further directions was made by each of the applicants to the county court judge that a further order be made for the recovery of the tithe rentcharge and costs after giving credit for the amount realized by the sale, and that the order be executed by the appointment of an officer to distrain; the main grounds of each application being that the first distress was rendered abortive by the action of the respondent, and that the officer reasonably mistook the value of the goods seized. The respondent gave notice of opposition to these applications.

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(1) The material provisions of the Act are set out below in the judgment of Lord Wright.

On March 15, 1934, these applications were heard by the county court judge, when evidence was given on behalf of the applicants by Mr. Bowes, the distraining officer, and Mr. Squarey, of the firm of Rawlence & Squarey, auctioneers, and on behalf of the respondent by himself; and the case was argued by counsel on both sides.

On April 16, 1934, the county court judge gave judgment. He found (1) on the evidence that the respondent had used threats to prevent the sale of the hay ricks by auction under the original orders of the county court, but that these threats were not put into execution nor were any acts of violence committed; that the officer was unable to get auctioneers to sell the ricks when it was known that the sale related to tithes; that under the order for leave to sell by tender two tenders were received, the higher being that of the respondent for 10*l.*, which was accepted; that the officer himself considered that the value of the ricks was more than sufficient to cover the amount due; that, beyond the fact that the respondent was a member of the Anti-Tithe Association and considered that the whole system of tithes was wrong, there was no evidence that he was in any way instrumental in preventing tenders being given; and that, in consequence of the threats of the respondent and the difficulty of obtaining any auctioneers, no sale by auction was attempted. On these findings the judge held that, as the applicants had accepted the tender of the respondent on the first distress, there was an end of the matter, and the county court had no jurisdiction to order a second distress, and he dismissed the applications.

The applicants gave notice of appeal for an order that the judgment of the county court judge be set aside, and that a further order for the aforesaid sums of tithe rentcharge be made to be executed by the appointment of an officer to distrain; or that the officer previously appointed to distrain be directed to levy a second distress for the said sums, on the

(1) The material findings of the county court judge are stated below in the judgments of the Court.

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grounds: (1.) that the judge misdirected himself in law in holding that, notwithstanding that the officer appointed to distrain seized hayricks which were or were believed by him to be or were apparently sufficient in value to satisfy the amounts to be recovered, but which on a sale by tender only realized 10*l.*, he (the judge) had no jurisdiction to direct the officer to levy a second distress for the amounts; (2.) that the judge was wrong in law in holding that, because the officer accepted the offer of 10*l.* from the respondent, he (the judge) was precluded from ordering or had no jurisdiction to order or direct the officer to levy a second distress; (3.) that the judge was wrong in law in not holding on the facts found, or proved or admitted, that the officer fairly supposed the distress to be of proper value at the time when he so levied and afterwards found it to be insufficient, and accordingly ought to be directed to distrain again for the amount unsatisfied by the first distress; (4.) that the judge misdirected himself in not holding on the facts found, or proved or admitted that the officer reasonably mistook the value of the goods, and that the same having turned out to be of insufficient value, the officer ought to be directed to distrain a second time for the balance unpaid; (5.) that there was no evidence upon which the judge could hold that there was no reasonable or any mistake in the value of the hayricks sufficient to enable him to direct a second distress; (6.) that, upon the facts found by, or proved or admitted before, the judge, he was wrong in law in not ordering, or not giving directions to the officer to levy a second distress for the amounts unsatisfied by the first distress.

Sir W. Jowitt K.C. and *P. E. Sandlands* for the applicants, appellants:

The county court judge was wrong in refusing to grant the application of the appellants under the Tithe Act, 1891, s. 2 (1), for a further order for the recovery of the sums due in respect of tithe rentcharge and for the execution of the order by the appointment of an officer to distrain therefor.

(1) The material statutory provisions are set out below in the judgment of Lord Wright.

Originally tithes were recoverable in the ecclesiastical courts, whose jurisdiction was confirmed by various statutes, and distress for tithes was under ecclesiastical control exclusively. The Tithe Act, 1836, altered that system entirely, providing by s. 67 that tithe rentcharge should be payable instead of tithes, and by s. 81 (1) that on certain conditions the person entitled to the tithe rentcharge might distrain therefor as any landlord might for arrears of rent. These provisions remained unaltered until the passing of the Tithe Act, 1891, s. 2 (1) of which provides by sub-s. 1 (1) that tithe rentcharge in arrear shall be recoverable only by order made by the county court after hearing the parties, and by sub-s. 2 that the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have power to distrain for the sum to be paid. It early became the rule that a person exercising his right of distraint for the sum due to him must not act harshly or oppressively towards the distrainee; and, accordingly, that he must not split his demand and distrain for one part of it at one time and another part of it at a later time: see Comyn's Digest, " Distress (A 1.)." To that general rule against making a second distress there are, however, two well established exceptions. One of these exceptions includes cases where, through a bona fide and excusable mistake on his part, the distrainor in making the original distress has taken goods of insufficient value to satisfy his claim: *Hutchins* v. *Chambers* (2), per Lord Mansfield, and *Bagge* v. *Mawby* (3), per Parke B. The present case comes within that exception. There was evidence to show, and it has been found, that in ordinary circumstances the three hayricks which the officer seized would have a market value of about 170*l.*, a sum greatly exceeding the amount of the claim, and the officer seized them as being of that value. In the peculiar circumstances of the case, however, the hayricks could not be sold for more than 10*l.* The officer could not be expected to know of the small value of the ricks in the peculiar circumstances, and he made a bona fide and excusable mistake in treating them as being of market value. The county court judge was in error in holding that there had been no mistake by the officer as to the value of the hay. The value of an article is not a fixed quantity, but is dependent upon circumstances. Its value in any particular circumstances is the price for which it can be sold in these circumstances. Here the officer, not being aware of the unusual value of the hay, made the very natural mistake of supposing it to have its ordinary value. The officer appointed by the court under the Tithe Acts with power to distrain is not the agent of the titheowner but of the court acting subject to the direction of the court; and if in this case the distress has been rendered ineffectual by a mistake of the officer it would not be reasonable that the appellants should be prejudiced by that mistake and prevented from making a second distress. The second exception to the general rule against making a further distress comprises cases where the distrainee has himself contributed to render the first distress insufficient: *Lee* v. *Cooke* (1) and *Rex* v. *Judge Clements. Ex parte Ferridge.* (2) In the present case it has been found that in consequence, among other things, of the threats of the respondent when the first distress was levied, no sale by auction was attempted. The ineffectiveness of that distress having thus been due in part to the conduct of the respondent the case comes within the second exception to the general rule, and for this reason also the appellants are entitled to make a second distress. In *Rex* v. *Judge Clements* (2) Lord Hewart C.J. said, perhaps obiter, that even if the distrainee had not himself been party to the proceedings which rendered the first distress abortive, he saw no reason why a further application to the county court judge should not be made. However that may be, a distrainee who has prevented one attempt to recover tithe by distress is not to be heard to say that another attempt should not be made. Unless the appellants can enforce payment of the sums due to them by a second distress, they will be unable to recover them by any legal process. Before the Act of 1891, although a titheowner might not have been allowed to distrain twice, he could still bring an action to recover any deficiency on the distress. But s. 2, sub-s. 2, of that Act provides that tithe rentcharge shall not be recovered in any other manner than that provided by the Act, and therefore, if the appellants are refused a second distress, they will be without a remedy, for they cannot bring an action.

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(1) The material statutory provisions are set out below in the judgment of Lord Wright.

(2) 1 Burr. 579, 589.

(3) 8 Ex. 641.

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(1) 3 H. & N. 203.

(2) [1932] 2 K. B. 535.

A. W. Roskill for the respondent. The county court judge rightly refused to grant the application of the appellants.

The general rule of law is well established that a person entitled to a sum of money as rent or rentcharge who has made a distraint for that sum has no right to make a further distraint for it, unless he can show that his case comes within some exception to that general rule. The appellants allege that there are two exceptions to that general rule and that this case falls within either or both of these exceptions.

The first contention of the appellants is that there is an exception to the general rule where there has been a bona fide and excusable mistake in overestimating the value of the goods seized under the first distress and that a mistake of that kind was made in this case. In answer to that contention it is submitted, in the first place, that there was no mistake as to the value of the hayricks at the time when they were seized. The evidence shows that they were then of the market value of about 170*l.*, and that was presumably their true value. The reason why they were not sold for an adequate price is that no reasonable attempt was made to obtain such a price for them. The county court officer stated in the course of his evidence, and his statements were not disputed, that this was the first case in which he had had to carry out a distress for tithe rentcharge; that with the object of having the hayricks sold by auction he had approached four auctioneers, all of whom carried on business in the locality, but no others; and that tenders by purchasers had been advertised for in only one local newspaper. In view of the strength of local feeling that is admittedly aroused by distress for arrears of tithe rentcharge, it is submitted that, where a proper price cannot be obtained locally, every reasonable effort should be made to effect a sale elsewhere. Such an effort might well have been successful in this instance, the market value of the hay being such as to provide a more than sufficient margin to cover any reasonable expenses of transport to a considerable distance from the place of seizure. In consequence of the fact that no such effort was made to sell the hay out of the immediate district, it was disposed of locally for the absurdly low price of 10*l.* In the circumstances it cannot be said that, because the hay was in fact sold for 10*l.*, that sum represented its true value. The hay failed to realise its market price, not because a mistake was made in appraising it as of that price at the time of seizure, but because it was sold at an undervalue by direction of the county court. That being so, the appellants should seek redress not from the respondent but from the county court: *Keightley* v. *Birch* (1); and *Phillips* v. *Bacon.* (2) In the next place, assuming in the appellants' favour that there was a mistake in value, neither upon the facts nor in law are the appellants, on that account, entitled to an order for a further distress. They are not on that ground entitled to such an order upon the facts, which establish that the respondent's tender of 10*l.* was conclusively accepted and that there was an end of the matter. As to the law, a mistake in regard to the value of the goods seized does not raise an exception to the general rule of law against making a second distress. The case chiefly relied upon in support of that alleged exception is *Hutchins* v. *Chambers.* (3) That case, having been decided by Lord Mansfield, is naturally entitled to great respect, but it cannot be accepted as establishing that exception. It covers a number of different points, among which the question as to this exception is only one. There is no previous authority in favour of the exception. The older cases which lay down the general rule make no mention of any such exception: *Anon* (4); *Anon* (5); *Wallis* v. *Savill.* (6) The first edition of Comyn's Digest, Tit. "Distress (A 1.)" is silent in regard to the matter, and it is only in editions later in date than *Hutchins* v. *Chambers* (3) that a passage as to mistake in value is introduced. To the report of that case there is a footnote to the effect that the decision overrules *Wallis* v. *Savill* (1) although that case was " clearly law before." (2) Unless the Legislature had been clearly of opinion in 1665 that there was then no right of second distress it would not in that year have enacted 17 Car. 2, c. 7 (repd.), s. 4. It is therefore submitted that *Hutchins* v. *Chambers* (3) involves a break with a long chain of previous authority. This break may possibly be attributable to the circumstances of the period of the decision. It was a period when the influence and prestige of landlords were at their height, as shown for instance by the extent of the enclosures. It was a period when many statutes favourable to landlords were passed, for example the Distress for Rent Act, 1737 (11 Geo. 2, c. 19), and none favourable to tenants. The decision in question, by conferring upon landlords a right to a second distress in the case of a mistake in value, reflected the prevailing opinion of the time. There appears to be no case subsequent to *Hutchins* v. *Chambers* (3) in which a second distress has been held justifiable on the ground of a mistake in value at the time of the first. It is true that Lord Mansfield's decision has been approved by Tindal C.J. in *Dawson* v. *Cropp* (4), by Parke B. in *Bagge* v. *Mawby* (5) and by Lord Hanworth M.R. in *Queen Anne's Bounty* v. *Thorne* (6), but none of these cases involved any question of mistake in value, and these expressions of approval cannot therefore be regarded as more than obiter dicta. If it is to be open to a distrainor to levy a second distress whenever there has been a mistake in value at the time of the first distress, the protection which the law has always afforded against oppressive distresses will be virtually destroyed. It must follow that whenever a distrainor has not been fully satisfied, he will be at liberty to go on distraining until he is satisfied on the ground that he has mistaken the value of the articles which he has already seized. Recent authors have appreciated this difficulty and have sought to limit the application of *Hutchins* v. *Chambers* (3)

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(1) (1814) 3 Camp. 521.
(2) (1808) 9 East, 298.
(3) 1 Burr. 579.
(4) (1549) Moore, 7.
(5) (1582) Cro. Eliz. 13.
(6) (1700) 2 Lutw. 1532.

(1) 2 Lutw. 1532.
(2) 1 Burr. 579, 591.
(3) Ibid. 579.
(4) (1845) 1 C. B. 961.
(5) 8 Ex. 641.
(6) [1934] 2 K. B. 175, 187.

to cases where there has been a mistake in the value of articles of notoriously uncertain value, such as jewels, pictures, books or racehorses: see Redman's Landlord and Tenant (8th ed., 1924), p. 528; Halsbury's Laws of England (1910), vol. 11, p. 188; (2nd ed., 1933), vol. 10, p. 522; Richardson on Distress (1924), p. 88; and Woodfall's Landlord and Tenant (22nd ed., 1928), pp. 619, 620. It is submitted that if *Hutchins* v. *Chambers* (1) is to be applied at all at the present time, its application should at least be limited as these authors suggest.

The second contention of the appellants is that there is an exception to the general rule against a second distress where the first distress has been rendered ineffective by the conduct of the distrainee or by circumstances to which his conduct has contributed, and that this case comes under that exception. That contention is not open to the appellants because it is not raised in their notice of appeal. A contention of such great importance should have been specifically set out in the notice of appeal, but it is not mentioned in any part of the notice of appeal preceding the last paragraph thereof, and it is not sufficiently or at all indicated in that paragraph by the general statement "that upon the facts found by or proved or admitted before the county court judge, he was wrong." In any case this contention of the appellants must fail, inasmuch as, even if the original distress was ineffective, it does not appear that its ineffectiveness was caused or contributed to by the conduct of the respondent. There was no evidence that the respondent interfered with or frustrated the sale by auction. The only evidence that the respondent made any threats was that of the county court officer who spoke to his conversations with the respondent three weeks before the distress was levied. There was no evidence that threats were made to any auctioneer or that any auctioneer had even heard of what the respondent is alleged to have told the county court officer. The respondent cannot be held responsible for the reluctance of auctioneers to take part in the sale of goods seized in distress for arrears of tithe rentcharge. Further, as the learned judge finds, the alleged threats were never carried out and the respondent was

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(1) 1 Burr. 579.

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innocent of any violent conduct. Thus, upon the facts this case is very different from *Lee* v. *Cooke* (1) and *Rex* v. *Judge Clements. Ex parte Ferridge.* (2) The alleged threats had no relation to the subsequent sale by tender, and were quite unconnected with the acceptance by the county court officer of the respondent's offer of 10*l.* for the hay. The fact that the respondent was a member of a tithepayers' association cannot be regarded as conduct on his part which had any influence upon either the attempted sale by auction or the sale by tender. There is no evidence that that association was illegal, nor is the question of its legality material to the issue in these cases.

There are technical reasons why these applications for a further distress should not be entertained. Even if it be assumed in the appellants' favour that the applications are for directions under the Tithe Act, 1891, s. 2, sub-s. 2, they should have been made by the officer of the court appointed to distrain and not by the appellants. The Tithe Acts should be strictly construed. When a titheowner has once obtained an order for distress his powers are at an end. The order must thereafter be executed by the officer of the court and the titheowner has no right to intervene. If directions are required, the application for them must be made by the officer and not by the titheowner, and on this point it is submitted that *Rex* v. *Judge Clements. Ex parte Ferridge* (2) is wrong. There are, however, reasons for suggesting that the present applications are not applications for directions, but for a fresh order. Their form and contents indicate that they are not applications for directions but for an order for recovery of a sum on account of tithe rentcharge. If that be so, they are statute barred by the Act of 1891, s. 10, sub-s. 2, in that, having been made on November 22, 1933, in respect of tithe rentcharge which fell due on October 1, 1931, they were not made within two years from the date at which the tithe rentcharge became payable. It is desired on behalf of the respondent to reserve the point that ten days' notice in writing was not given before the levying of the distress, that point not being open to the respondent in this Court by reason of the decision in *Queen Anne's Bounty* v. *Thorne.* (3)

(1) 3 H. &. N. 203; 27 L. J. (Ex.) 337.

(2) [1932] 2 K. B. 535.

(3) [1934] 2 K. B. 175.

Sandlands was not called upon to reply.

C. S. Rewcastle held a watching brief on behalf of the Commissioners of Church Temporalities in Wales.

Lord Wright. This case raises a question of some general importance in this sense that, as appears in these proceedings, there is a concerted opposition by interested parties against the enforcement by titheowners of their rights to secure payment, by the process provided by law, of the tithes which they are lawfully entitled to have paid to them. It may be that that opposition, concerted as it is, has for its object not so much the refusal of payment of the comparatively small sums that are involved, as the securing of a change in the law and a relief from payment of tithe by owners of land in general. That, however, is a matter which does not in any way concern this Court, whose sole business it is to enforce the law as it stands according to the best of our judgment. I proceed, therefore, to deal with the case on that basis.

The facts have been found by the learned county court judge, and they are comparatively simple. They may be summarized in this way: The appellants are the representatives of two titheowners, one being King's College, Cambridge, and the other Queen Anne's Bounty. In respect of each case there is a separate proceeding, but these have been dealt with in argument and will be dealt with by me as if they formed only one proceeding, because the principles which they raise are common to both. [His Lordship stated the further facts of the proceedings substantially as above set out, and continued as follows :]

Tithes, as is well known, were originally charged in kind on the fruits of the soil and the titheowner was entitled to one-tenth in kind of what the soil produced. For these there was substituted by the Tithe Act, 1836, a payment in money, which is called a tithe rentcharge issuing out of the lands. That was an elaborate Act which was subsequently amended from time to time. Finally, the Tithe Act, 1891, was passed. That Act provides that the tithe rentcharge issuing out of lands shall be payable by the owner of the lands notwithstanding any contract between him and the occupier of such lands. In these cases the respondent is both owner and occupier. Sect. 2 deals with the recovery of tithe rentcharge through the county court and prescribes the machinery for that purpose, the control of that machinery being placed in the hands of the court. Sub-s. 1 of that section provides: "Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear . . . . the person entitled to such sum may . . . . apply to the county court . . . . and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum . . . . be . . . . recovered in manner provided by this Act . . . ." Sub-s. 2 provides: "Where . . . . the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers . . . ." Distress for tithe rentcharge is thus no longer the same in all respects as distress in the case of landlord and tenant within the old common law system of distress. The proceedings are not now under the control of the distraining creditor, but are placed in the hands of the county court, and whatever is done must be done under the directions of that court. The last-mentioned sub-section refers back to the Tithe Act, 1836, and I think for this purpose it is only necessary to refer to s. 81 of that Act, which provides: " . . . . in case the said rentcharge at any time be in arrear and unpaid for . . . . twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days notice in writing at the . . . . residence of the tenant in possession, to distrain upon the lands . . . . for all arrears . . . . and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years. . . . ." These are, I think, the relevant statutory provisions. I shall

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only refer to one further provision of the Act of 1891, that is s. 10, sub-s. 2, which is in these terms: "A sum on account of tithe rentcharge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable."

Before I leave the sections and pass to a consideration of the substantial matters peculiarly relevant to this case, I ought to refer to two objections which were taken on behalf of the respondent. One is that in the state of facts that I have stated the proceedings which are now on foot are incompetent because they were not commenced before the expiration of two years from the date on which the tithe rentcharge became payable within the meaning of s. 10, sub-s. 2. I do not think there is anything in that objection. I think that under that sub-section the proceedings which have to be commenced before the expiration of two years from the date at which the tithe rentcharge became payable are the original proceedings for the recovery of the charge, that is to say, in this instance, the proceedings which were taken in one case on April 4, 1932, and in the other case on April 16, 1932, and those proceedings were clearly commenced within two years from the date at which the tithe rentcharges in question became payable. This appeal arises out of what has sometimes been called an order, but which I think is more properly called a direction made under s. 2, sub-s. 2, of the Tithe Act, 1891. That section deals with two matters. It deals, by sub-s. 1, with the case of the person entitled applying to the county court, and thereupon the county court, if satisfied in accordance with the terms of the section, ordering that the sum shall be recovered. The proceedings referred to in s. 10, sub-s. 2, are these proceedings for an order that the sum should be recovered. When that order has been made, then under s. 2, sub-s. 2, there comes into operation the machinery, and all that machinery which is initiated by the appointment by the court of an officer to carry out the distraint is subject to the direction of the court. The court, therefore, from time to time has to make directions under its original order; but it is the proceedings on the application for the original order which are the subject of s. 10, sub-s. 2. Therefore, in my opinion, this point, a purely technical point, fails.

Another point has been taken merely in order to be kept alive, because it is admittedly not open in this court, and that is the point based upon s. 81 of the Tithe Act, 1836. That section says: " . . . . in case the said rentcharge shall at any time be in arrear and unpaid . . . . it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the . . . . residence of the tenant in possession, to distrain." I am not sure that in any case that provision would apply to the direction of the court, but this matter has been concluded by the decision of this Court in *Queen Anne's Bounty* v. *Thorne* (1), where it was held that the obligation to give ten days' notice of an intention to distrain under s. 81 of the Tithe Act, 1836, is not imported into s. 2, sub-s. 2, of the Act of 1891, under the words which enact that the court " shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge." I need say no more therefore on that head.

While I am referring to these sections, I may mention a point which was rather indicated than argued by Sir William Jowitt, that the rules which have been laid down in the cases as limiting the powers of distress do not apply to a case like that arising under these Acts where the conduct of the distress is not left to the judgment and initiative of the titheowner or landlord, but has to be exercised at every stage under the directions of the Court. Sir William Jowitt said it would be very hard if a titheowner were penalized because an officer of the court over whom he has no control has made a mistake and, therefore, that a different rule would apply under these Acts than that which has been applied in other cases of distress. I do not stop to consider that point further because, for reasons which will appear as I proceed, it is not, in my opinion, material to the decision of this case. I express no opinion about it either one way or the other.

(1) [1934] 2 K. B. 175.

I ought perhaps just to refer to one argument which was raised by Mr. Roskill—namely, that the particular proceedings which are the subject of this appeal should not be regarded as taking place under a mere " direction " of the Court within s. 2, sub-s. 2, of the Act of 1891, because of the form of the application. It was an application for an order, and he says that an order is something different from a direction. I do not wish to spend any more time over that contention, because the real nature of the proceedings must appear from the terms of the Act, and whatever was done was done with the intention of acting under the Act and bringing into effect its machinery subject to the control of the county court judge as the Act provides.

I now pass to the substance of the matter. I say nothing for the moment as to whether the county court judge was right in treating the matter as one of jurisdiction. The appeal claims that the judge was wrong in refusing to order or direct that the officer appointed to distrain should be entitled to levy a second distress. There have been a number of authorities from comparatively early times dealing with the question whether a second distress can be permitted and, if so, in what circumstances. It is quite clear that in general a debtor, whether he be a tenant, or a person liable to pay tithes, or a person liable to pay a statutory impost of one kind or another to which the remedy of distress has been applied, must not be subject to any undue hardship or embarrassment in the levying of the distress; and it is for that reason that it has been laid down as a general rule that a second distress is not permissible. Prima facie the creditor is not entitled to split up his process of execution. If he fails to obtain satisfaction by the first distress his powers of distraint are presumably exhausted, and he must look to some other remedy, if any other remedy is competent. It is accordingly on the person claiming that he is entitled to levy a second distress, as I think, that the burden lies of justifying that claim. There are many authorities, but I need not refer to more than one or two of them. For instance in Comyns' Digest under the heading " Distress (A 1.) " it was said "a man cannot take two distresses for the same rent: for it was his folly that he did not take sufficient at first." That is the general rule. It has been a little more developed in later cases, and in particular I may refer to two of these. One is *Dawson* v. *Cropp* (1), which arose on demurrer. I need not deal in detail with the facts of that case. The headnote is: "Trover lies against a landlord who makes a second distress for the same rent, when he might have taken sufficient at first; or where, having taken a sufficient distress at first, he voluntarily abandons it." Trover, of course, lies because a person who distrains without proper cause and seizes under a distress which is not justified is committing a trespass by entering another man's lands and also conversion by taking away property of that other person which he has no right to take away. The question in that case was purely one of pleading, but Tindal C.J., in delivering the judgment of the Court of Common Pleas in 1845, said: "Assuming that the rent remained due, not having been satisfied by the first distress . . . . still the landlord could not, under the circumstances stated in the replication, make a second distress. In Com. Dig. Distress (A 1.)"—that is the passage I read—"it is laid down that 'a man cannot take two distresses for the same rent, for, it was his folly that he did not take sufficient at first.' In that passage, it is assumed that he might have taken sufficient at first: in this replication it is averred that he did take sufficient at first. Lord Chief Baron Comyns refers to Moore, 7 (2); Cro. Eliz. 13 (3) (which was cited on the argument), and Lutw., 1536 (4)." (5) Then he proceeds to quote from Moore: "A man distrained, for 10*l.* rent, due at Michaelmas by reservation, certain sheep which were not of the value of 40*s.*, and afterwards distrained for the residue; and the tenant made several replevins. The question was, if he could make an avowry: Montague, Hinde, and Harris: You cannot; for, the distress is not good; and it is the folly of the lessor that he would so distrain in the

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(1) 1 C. B. 961.

(2) (1549) Anon., Moore, 7.

(3) (1582) Anon. Cro. Eliz. 13.

(4) *Wallis* v. *Savill* (1700) 2 Lutw. 1532.

(5) 1 C. B. 961, 971.

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first instance. Montague: Recaption lies for the second distress. Brown: If a man be in arrear of his rent at several days, and takes a distress for one day at one time, and for another day at another time, he may: but it is otherwise in the case at bar." (1) Then reference was made to the case of *Wallis* v. *Savill* (2), which was said to be an authority for the same proposition, that a man cannot take a second distress for the same rent when he might have taken sufficient at first. I refer to one other case, slightly later, and that is *Bagge* v. *Mawby* (3) where a landlord who had put in a distress was notified by a third person, a creditor of the tenant, that the tenant had become bankrupt and that all his property would be divided among his creditors. The creditor wrote and made certain threats, and on that the landlord abandoned the distress without taking payment of his rent. Then he sought to levy the second distress, and it was held that he could not do so. Parke B., giving the judgment of the Court of Exchequer, said: "The question is, whether the second distress, which was made on the 16th of November, was a lawful distress. There is nothing more clear than this, that a person cannot distrain twice for the same rent; for if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course, as, for example, in the instance put by Lord Mansfield C.J. in the case referred to on the argument, *Hutchins* v. *Chambers*. (4)" (5) So that Parke B., whose authority is very great, is there quoting with his approval the judgment of Lord Mansfield. Then Parke B. proceeds: "If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or if the tenant has done anything equivalent to saying, 'forbear to distrain now, and postpone your distress to some other time.' In such cases the landlord may distrain a second time. But if there is a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again." (1)

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(1) 1 C. B. 961.
(2) 2 Lutw. 1532.
(3) 8 Ex. 641.
(4) 1 Burr. 579.
(5) 8 Ex. 641, 648.

So much for the general principle, which can now be supplemented by a reference to the exceptions dealt with by Lord Mansfield in *Hutchins* v. *Chambers* (2), a case which was expressly approved by Parke B. in 1853 (3) and has in this very year been referred to as an authority by Lord Hanworth M.R. in the case already cited of *Queen Anne's Bounty* v. *Thorne*. (4) Lord Mansfield's high authority needs no support and I would not have referred to later cases on the point at all but for certain arguments of Mr. Roskill, firstly that Lord Mansfield was not a judge who could be taken seriously in these days, and secondly that the case of *Hutchins* v. *Chambers* (2) had never been drawn out of the retirement into which it sank in the eighteenth century. That case is, however, in my view a leading case. It was not a case of landlord and tenant, but an action of trespass against the justices of the peace, the parish officers, the constables and their assistants for executing a warrant of distress made by two justices upon a poor rate. Parke B. treats it as an authority on the general law of distress and uses it as an authority in the ordinary case of landlord and tenant, and it would clearly be an authority in a case like the present, where there is a statutory charge and statutory machinery for enforcing that charge by distress through the medium of the county court. There were five questions stated for the opinion of the Court. I need not refer to more than two of them. Lord Mansfield says: "The 1st question is 'whether averia carucae may be taken for a distress upon the poor's rate, where there are other distrainable goods sufficient.'" (5) The learned judge deals with that question. I do not dwell upon that part of the case except to point out that it shows that no distinction was drawn for

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(1) 8 Ex. 649.
(2) 1 Burr. 579.
(3) 8 Ex. 641, 648.
(4) [1934] 2 K. B. 175, 187.
(5) 1 Burr. 587, 588.

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this purpose as regards the general law of distress upon the nature of the property which formed the basis of the distress. Then he proceeds: "As to the second distress"—and that is the point which is peculiarly material here—"The 1st question relating to that, is 'whether this second distress can be at all justified: as it was a second distress taken under the same warrant; when enough might have been taken at first, if the distrainer had then thought proper.'" (1) Then Lord Mansfield proceeds to a passage in his judgment which I think is so important that it should be read at length: "Now a man who has an entire duty, shall not split the entire sum; and distrain for part of it at one time, and for other part of it at another time; and so toties quoties, for several times; for, that is great oppression; And that is the case of *Wallis* v. *Savill et al'*, in 2 Lutw. 1532: where the second distress was holden unjustifiable, because both distresses were taken for one and the same rent; and it was the lessor's folly, that he had not taken a sufficient distress at first. But if a man seises for the whole sum that is due to him, and only mistakes the value of the goods seised, (which may be of very uncertain, or even imaginary value, as pictures, jewels, racehorses, etc.,) there is no reason why he should not afterwards complete his execution by making a further seizure. And how can the officer who seizes, judge of the real or perhaps imaginary value of the horses or goods seized? The value of them may be quite unknown to him; or may even depend upon whim and fancy. It is to the advantage of the owner of the goods, that this should be so: it is better for him that the officer should be at liberty to seize a second time, in case he makes an insufficient seizure the first time. Or else, it might induce him to a necessity of taking effects of a very great value, at first: for, if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at first. Now pictures, horses, jewels, books, and some other such effects, may be of so uncertain and even imaginary or fancied value, that it may be exceedingly uncertain how much money they may fetch, when they come to be sold: so that the person seizing may not be at all able to judge how much they may produce upon sale. And if he does not take the value of the whole at first, (out of tenderness and moderation perhaps,) there is no reason why he should not complete it by a second seizure; provided it be for the same sum due." (1) I think Lord Mansfield is there putting it that a second distress is permissible where there has been some mistake, the nature of which I shall discuss in a moment, in the making of the first distress.

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(1) 1 Burr. 589.

Having read those general authorities, I now pass at once to the points raised in this particular case. As I follow the argument of Sir William Jowitt, he does not contest that the burden is upon the appellants to justify their claim to levy a second distress, but he says that there are two grounds upon which they can so justify it. One of these grounds is that the rules laid down by Lord Mansfield and repeated by Parke B. regarding a mistake in value, read, as they must be, with the appropriate qualifications, apply to this case. The other ground is that the first distress was rendered abortive by the misconduct of the respondent himself, and that ground, to which I shall refer in due course, is illustrated by the well known case of *Lee* v. *Cooke*. (2) Both those points have to be considered separately, although in truth they may be regarded to some extent as running together. I think that both points are open to the appellants in this case. It is true that in the notice of appeal the former point, the point as to mistake, is more elaborately developed; but the other point, the point about the respondent's misconduct, to use a compendious expression, was taken before the court below and was dealt with by the learned county court judge in his judgment, and I think that that point, having been so taken, is open on the notice of appeal as it stands under the general terms of its final paragraph. If it were not, it could easily be made the subject of an amendment, because I am quite satisfied that no one was taken by surprise and that it would have been quite unnecessary, as a term of any amendment, to adjourn the proceedings in order that the point should be taken. I therefore treat both points as open.

(1) 1 Burr. 579, 589.   (2) 3 H. & N. 203.

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As to the first point, the question of mistake in value, I must refer to the findings of the county court judge, and at the same time perhaps it will be convenient also to refer to his findings on the second point; and, having done so, and expressed my view of the effect of his findings, I can then deal with the matter of principle on both points. The material findings of the county court judge to which I want to refer are these: He finds that the bailiff, Mr. Bowes, put a man in possession and in the absence of the respondent informed the respondent's wife that he had done so. "Three weeks prior to October 11 the respondent had informed the bailiff that he had no intention of paying while a man was in possession and that he would dig a trench around the hayricks to make them inaccessible. The respondent also told the bailiff that if the ricks were to be put up for auction he would get all the farmers in the neighbourhood to prevent the sale." No trench was, in fact, dug and no threats of the respondent's were put into execution; nor any acts of violence committed." Then the county court judge proceeds: "The bailiff endeavoured to get auctioneers to sell the ricks, but he was unable to do so when it was known that the sale was one relating to tithes." That is a general finding which, I think, is subject to no qualification. "In consequence of the respondent's threats and the difficulty of obtaining the services of auctioneers, application was made to me by my registrar for leave to sell by tender. I granted the application and tenders were accordingly invited by advertisement in the 'Western Gazette,' which circulates in the whole district, and in addition several dealers were invited by the registrar to tender. Two tenders were received, the highest being made by Spicer, the respondent, for 10*l.* The bailiff himself considered the value of the ricks was more than sufficient to cover the amount due. The market value of the ricks was in fact about 170*l.* The bailiff endeavoured to get the respondent to increase his offer to 20*l.* but without success, and then to 15*l.* with no better result." And the judge finds that the bailiff then took the 10*l.* A little later the judge says this: "Beyond the fact that the respondent was a member of the Anti-Tithe Association, and his admission that he considered the whole system of tithes was wrong, there was no evidence that he was instrumental in preventing other tenders being made." But a little later the judge finds this : " In the present case, in consequence of the threats which Spicer, the respondent, made when the first distress was levied, and of the difficulty of obtaining any auctioneers to sell the hayricks, no sale by auction was attempted. The reason for two tenders only being received is a matter for speculation, but there was no evidence upon which I could find that the absence of more tenders was due in the present case to a combination of persons to set the law at naught ; nor was there any evidence that Spicer himself was in any way instrumental in preventing tenders being given." The result is, therefore, on this aspect of the case that the county court judge finds that it was the threats of the respondent which prevented any sale by auction from being attempted, although he finds that there is no evidence to show why no other tenders were made than those of the respondent himself of 10*l.* and of one other person for a smaller sum. So much for that. On the question of mistake as to value, this is what the learned county court judge says : " With regard to the very old case of *Hutchins* v. *Chambers* (1) " —that case would seem to have been held up to general obloquy on the ground of its antiquity—" it is sufficient for me to say that there was no such mistake by the bailiff in the present case as there was in *Hutchins'* case (1), or in fact any mistake at all as to the value of the goods seized, and I am unable on the authority of that case to order a second distress." The word " value " there obviously means, one would expect, in the mind of the county court judge, the market value. He has found that the market value of the ricks was, in fact, about 170*l.* ; and when he finds, first, that there is no mistake at all in the value of the goods seized, and, secondly, that they could not be sold—because that is the effect of what he does find—in all the facts of the case for more than 10*l.*, he is, in fact, as I respectfully think, confusing two entirely different things, and it is his confusion on a matter of law which has

(1) 1 Burr. 579.

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induced him to come to the decision to which he has come and to fail to appreciate the effect of *Hutchins* v. *Chambers* (1), and of the statement of the law made by Parke B. which I have already read. In my judgment the true position here is this: the goods were seized by the bailiff on the basis of their market value; the bailiff did not appreciate that whatever the market value of this hay it had in the circumstances of the case a value of its own which was quite different from its market value. I think that that mistake was a mistake which it was quite natural for the bailiff to make and that he cannot be held in any way in fault because he did not appreciate the very peculiar circumstances affecting the value of the hay, which were attributable to some extent to the conduct of the respondent himself. That I think was a mistake within the meaning of the rules which I find laid down by Lord Mansfield and Parke B. Lord Mansfield says this—I will only read again a very few words from his judgment—" How can the officer who seizes, judge of the real or perhaps imaginary value of the horses or goods seized " (2); and he says that with reference to goods seized which may be of a very uncertain or even imaginary value. A little later he says: " Pictures, horses, jewels, books, and some other such effects, may be of so uncertain and even imaginary or fancied value, that it may be exceedingly uncertain how much money they may fetch, when they come to be sold." (3) Lord Mansfield, therefore, was treating the relevant question as being how much the goods may fetch when they come to be sold. To the same effect Parke B. says in *Bagge* v. *Mawby* (4)—I am reading again what I have already read—" If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder." (5) The test there put is whether the landlord fairly supposing the distress to be of the proper value. It is clear that the mere fact that the

(1) 1 Burr. 579.
(2) Ibid. 589.
(3) 1 Burr. 590.
(4) 8 Ex. 641.
(5) Ibid. 649.

bailiff or the distrainor makes a mistake as to the value of what he is seizing is not in itself enough to justify a second distress. There must be some mistake which is excusable or justifiable in that it cannot be attributed to any neglect or default or lack of judgment, still less to any folly on the part of the distrainor. If there is, in fact, such a mistake, a mistake by which the landlord fairly supposed the distress to be of the proper value, a mistake as to what the goods will realize when the matter is actually put to the test, then, I think, the principle applies. It was argued that Lord Mansfield's words only referred to cases where there was some intrinsic quality in the goods themselves which rendered their value not easily ascertainable by the distrainor at the time of the distress, and emphasis was laid on the particular instances given by Lord Mansfield of things like pictures, jewels, racehorses and some other such effects. In dealing with that argument it is only necessary to ask what is meant by "intrinsic value." Lord Mansfield is stating a general principle and giving some obvious illustrations. It may well be that the bailiff did not anticipate the curious state of things which has arisen here where goods with a perfectly well recognised market value only realized perhaps one-twentieth or one-seventeenth of that value. "Intrinsic value" strictly analysed has no special meaning at all in this connection. The value of the thing depends not on its essential character, but on the demand which there is for it. When the value of a particular thing is regarded from the point of view of what it will fetch, that value depends not on the essential character of the thing, but on the possibility of disposing of it in the market and on the demand for it in all the facts of the case. Here the demand for the hayricks was determined by certain circumstances which the bailiff, in my judgment, could not properly be required to have ascertained and determined for himself in advance. I think the mistake which was made was not a mistake as to the market value of the hay but a mistake as to what in all the facts of the case it would fetch when it was sold; and I think that that was in principle such a mistake as Lord Mansfield and Parke B. had in mind in the passage which I read. I think, therefore, applying

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that principle to the facts of this case, that the mistake is one which comes within their ruling. If that view is right, then it follows on the facts found by the county court judge that he has misdirected himself in law because, having found that there was in fact no mistake as to the market value of the goods seized, he has thereupon gone on to find that there was no mistake at all as to their value. He is confusing two separate things, the market value on the one hand, and the value for the purposes of realization in the facts of the case on the other. On the whole of the facts which he has found I think no other conclusion is possible in law than that there was a mistake such as to bring the case within the authorities which I have quoted.

The other point as to the misconduct of the respondent is also one on which, I think, the appellants ought to succeed. The principle applicable is laid down in *Lee* v. *Cooke* (1), a case which has been recently followed and applied by the Divisional Court in *Rex* v. *Judge Clements. Ex parte Ferridge.* (2) The principle is very clearly stated by Crompton J. in the former of these cases, where he says (3): " The rule of law is, and very properly, that a person cannot distrain a second time for the same cause, if he has had an opportunity of making available the first distress. On the other hand if, by the unlawful act of the distrainee, the distrainor is prevented from realising the distress, he may distrain again. Here, the plaintiff by his unlawful conduct prevented the first distress from being available, and therefore he cannot complain of the second." By " unlawful " I think the learned judge means " wrongful." It was a peculiar case because the thing distrained was a stack of beans and it was sold by auction. The plaintiff said in effect that they would not get any one to take it away and the purchaser was so terrified by these threats that he did not take it away. Indeed, he endeavoured to take it away but was forcibly prevented by the plaintiff from doing so. It was argued with a great deal of plausibility that in those

(1) 3 H. & N. 203.

(2) [1932] 2 K. B. 535.

(3) 3 H. & N. 203, 207.

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circumstances there had been a sale and that the distress had produced satisfaction and that the landlord ought to look to the purchaser and make him fulfil his contract and not claim second distress. But the Exchequer Chamber took a different view, affirming the Court of Exchequer, and held that it was a case of misconduct on the part of the distrainee and that in those circumstances as it was his own conduct which had rendered the first distress abortive he could not complain of a second distress being made and that a second distress was justifiable. In the case of *Ex parte Ferridge* (1) the same principle was applied to facts which were not dissimilar in principle from those in the present case. In the headnote to that case it is stated that " The officer of the court distrained and offered the goods seized for sale by auction. A number of persons attended the sale and by their conduct prevented it from being successful, not bidding themselves and preventing others from bidding." That is, of course, very like this case in which it is found as a fact that in consequence of the threats of the respondent and of the difficulty in obtaining any auctioneers to sell the hayricks no sale by auction was attempted and, therefore, the proceeding at best was limited to this almost ludicrous sale by tender at which no one would tender except the respondent himself, who offered the ridiculously small sum of 10*l*., which was accepted as the only possible means of realizing anything at all by the first distress. I think that this also is a clear case of misconduct, of wrongful acts or unlawful acts, on the part of the respondent preventing the first distress from being effective. I do not stop to consider, though there is a temptation to do so, whether the organization known as the Anti-Tithe Association, about which Mr. Squarey, the auctioneer, gave evidence, and which it is not contested existed and was operative in this particular transaction, is an unlawful association. This is how it was described by that witness, and I think the county court judge accepted his statement : " There is an organisation in opposition to tithe payments. Their purpose is to prevent sales. Cannot get auctioneers to conduct sales." Such an organization according to that description appears on the face of it to be one intended to impede the ordinary process of justice in this country and to discourage creditors from availing themselves of the legal machinery provided to them for the enforcement of their rights. It is not, however, necessary for me, and perhaps it is not desirable, to deal with that aspect of the case any further. I think on this point also, having regard to the facts found by the learned judge, that he ought as a matter of law to have held that the respondent by his own conduct rendered the first distress abortive and, therefore, cannot object to a second distress for the same tithe rentcharge.

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(1) [1932] 2 K. B. 535.

The county court judge held that once the tender of the respondent was accepted there was an end of the matter and that he had no jurisdiction to grant the application for a second distress. I do not know why he put his decision on the basis of want of jurisdiction. I think his duty under s. 2 of the Tithe Act, 1891, was, first of all, in due course to order the said sum to be recovered " in manner provided by this Act," and then to comply with the requirement of sub-s. 2 that " the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint " and so forth. His duty was to appoint an officer to distrain, either the officer of the court or some other agent, and, on a request or application being made to him to give further directions, to consider that request or application, and to exercise a discretion, but a judicial discretion. In my opinion, on the facts of this case, as the judge has himself found them, his discretion can only be exercised judicially by giving directions in accordance with the views expressed by this Court. While I state as a matter of law that the judge has a discretion to give directions, that whatever directions he gives are subject to appeal to this Court like any other order which he makes, and that it is fallacious to treat it as a matter of jurisdiction, still it seems to me that as he is the person to give the directions the matter should go back to him with the expression of opinion of this Court as to the principles of law to be applied in order that he may make the appropriate directions in the judicial exercise of his discretion. It accordingly follows that the appeal succeeds and the appellants must have their respective costs at the trial.

SLESSER L.J. I agree. In my opinion there is nothing in law to prevent the learned county court judge from giving a direction under s. 2, sub-s. 2, of the Tithe Act, 1891, for a second distress on the facts of this case. He has come to the conclusion that he has no power to give such a direction, and that conclusion, I think, in the circumstances of this case and on his findings of fact, is erroneous.

It is admitted that the respondent was at material times in debt to Queen Anne's Bounty and to the provost and scholars of King's College, Cambridge, for the sums claimed by them as arrears of tithe rentcharge. There is no doubt about the legality of their demand. It is not disputed that they were entitled under the combined Tithe Acts of 1891 and 1836 to levy distress in respect of these arrears of tithe rentcharge which deliberately and without any excuse had not been paid. In those circumstances prima facie, unless there be some principle to the contrary, one would hesitate to think that a person who has no defence at all to the payment of tithe save some objection to the general policy of tithe payment, can deliberately refuse to allow the machinery of the law for enforcing payment to come into operation. I start with the assumption that it is improbable that the law has produced such a situation that a man may with impunity break it.

The first point here taken for the appellants is that the first distress was rendered ineffective by the conduct of the respondent. On this the learned judge has found that the respondent by threats prevented the holding of an auction for the sale of the goods distrained. He says: " In consequence of the threats which Spicer, the respondent, made when the first distress was levied, and of the difficulty of obtaining auctioneers to sell the hayricks, no sale by auction was attempted." He also finds that " Three weeks prior to October 11 the respondent had informed the bailiff that he had no intention of paying while a man was in possession, and that he would dig a trench around the hayricks to make them inaccessible." Those are findings of fact, and it thus appears that, at any rate, one method open to the appellants of realizing their debt by distress—namely, that of sale by auction, was prevented by the threats of the respondent. The judge has found in addition that the respondent was a member of the Anti-Tithe Association, and as to that association the evidence, which so far as I can see is not contradicted, of Mr. Squarey, an auctioneer of experience, was that : " There is an organisation in opposition to tithe payments. Their purpose is to prevent sales. Cannot get auctioneers to conduct sales." The respondent admitted that he was a member of the association and that it met at Salisbury. If that be a correct statement of the objects of this association, I agree with my Lord that it is nothing more nor less than an unlawful association and, I may add, an illegal conspiracy to break the law. However that may be, I do not at all base my judgment on anything connected with this association, but on the finding of the learned judge that the respondent did prevent an auction from being held.

By the common law distraint did not in itself give a right of sale, but an express right of sale is given over goods distrained for rent by the Act 2 W. & M. c. 5. Power is given to sell goods distrained in the circumstances mentioned in the statute for the best price obtainable, the actual language being that the person distraining " may lawfully sell the goods and chattels so distrained for the best price." That clearly included the right to sell by auction and it is interesting to observe that by the Auctioneers Act, 1845 (8 Vict. c. 15), s. 5, it is provided that it shall not be necessary for any person selling goods or chattels under a certain sum by auction to have a licence, and the Act includes any person selling under a distress for non-payment of tithes, among other matters. The Legislature thus contemplates that auction shall be a normal and proper method of selling goods under distress. In this case that method was prevented

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by the threats of the respondent. It is true that the judge went on later to find that the respondent did not interfere with the tender which followed upon the failure of the auction. He says: "There was no evidence upon which I could find that the absence of more tenders was due in the present case to a combination of persons to set the law at naught; nor was there any evidence that Spicer himself was in any way instrumental in preventing tenders being given." But the learned judge would seem to have forgotten that at least a part of the natural remedy in distress—namely, the right to have an auction, was, on his finding, prevented by the acts of the respondent. In those circumstances this case seems to me certainly to be governed by the several cases cited to us which decide that, if a tender is rendered abortive by the action of the persons whose goods are to be distrained, that person cannot complain of the granting of a second distress. Of these cases *Lee* v. *Cooke* (1) is perhaps the best example. In that case it was not contended that the distress was unlawful. Cockburn C.J. in the course of his judgment said: "They," that is the bailiffs, "then proceeded to sell. Leverton became the purchaser; but on his coming to take possession of the property, the plaintiff assaulted him and forcibly prevented his removing it; and Leverton consequently did not pay for it." (2) He says, later: "The completion of the first distress has been frustrated by the conduct of the person distrained on. The second distress is, therefore lawful." (2) Wightman J. said: "I am of the same opinion. The case of *Bagge* v. *Mawby* (3) is distinguishable, because there a mere threat was resorted to." (2) In that case, the question having been raised whether a notice that had been given to the landlord was a good cause for his abstaining from exercising the power of distress, Parke B. said (4): "We are all of opinion that it was not, and that it was a mere idle threat which he might and indeed ought to have disregarded." In the present case the finding of fact is that this

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(1) 3 H. & N. 203; 27 L. J. (Ex.) 337.

(2) 27 L.J. (Ex.) 337, 340.

(3) 8 Ex. 641.

(4) Ibid. 641, 649.

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first threat of the respondent was so compulsive in its nature that because of it no sale by auction was attempted. It is impossible here to say on the finding of fact that the threat was a mere idle threat. The finding, as I read it, is that as a direct consequence of the respondent's threats no sale by auction was attempted. *Lee* v. *Cooke* (1) was followed by *Rex* v. *Judge Clements. Ex parte Ferridge* (2), where no actual violence was attempted in the sense in which there was in the earlier case, but, as Lord Hewart C.J. and Avory J. point out, there was a combination of persons to set the law at naught and in fact the auction was, by their act, rendered abortive. Accepting what my Lord has said, I understand it to be the general principle of the law, established as far back as the time of Elizabeth, and perhaps earlier, and particularly expressed in Comyn's Digest, that normally a second distress is not permissible, because it is oppressive to the person distrained upon that the execution should be levied in two or more parts. See *Dawson* v. *Cropp.* (3) Nevertheless there are exceptions to that general rule one of which is that if by the act of the person complaining the first distress is rendered abortive that is, or may be, a sufficient justification for a second distress. That exception, I think, extends to a case where by a threat the right to the possibility of holding the auction, a necessary or desirable ingredient of the distress, is prevented by the threat itself, just as much as if the auction is actually disturbed or set at naught during its own proceedings.

The other point, as I see it, is that, owing to the fact that the conduct of the respondent prevented the auction, it was impossible for the bailiff in the circumstances of the case to obtain, or even to depend upon, the value which the ricks might have in the open market. The respondent by his own act has prevented the ricks from having their normal and proper value in the open market by preventing an auction from taking place, and therefore the value of these goods became merely a matter of conjecture and uncertainty, and within the meaning of Lord Mansfield's words in *Hutchins* v. *Chambers* (1) of " whim and fancy." The whim and fancy apparently here extended so far that the only tender which was received was the ludicrous tender by the respondent himself for 10*l*., a sum not enough to pay the costs, as we are told, of the proceedings and leaving nothing in recoupment of the tithe rentcharge wrongfully withheld. With every respect to Mr. Roskill, I think, on consideration, that it would be a very serious miscarriage of justice if it were to be held that the respondent, having prevented the distress from operating could himself object to a second distress on this technical ground. Fortunately the law does not in all cases allow technicality to interfere with the justice of the case, but, applying even the most technical standards, for the two reasons I have given—namely, that the respondent himself rendered the sale of these goods abortive, and that the bailiff did not act unreasonably or oppressively but from want of knowledge of the value of these goods within the meaning of Lord Mansfield's definition owing to the exclusion of the market by the act of the respondent himself, I am of opinion that this appeal should be allowed.

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(1) 3 H. & N. 203.

(2) [1932] 2 K. B. 535.

(3) 1 C. B. 961.

As to the other points which have been mentioned by my Lord, I do not think it necessary to add anything to what he has said except that I agree that on those points the arguments of Mr. Roskill fail.

TALBOT J. This case has been so fully dealt with that it would not be right for me to add more than a very few words. It seems to me that when the case is approached with a regard to common sense, that is to say, when the plain inferences to be drawn from its proved facts are considered, it really becomes very clear. There can be no doubt on a review of the facts actually proved before the learned county court judge and found by him, that in the district in which these lands are situate there is among the great majority of the land-owners a resolute intention to escape, if possible, the provisions by which Parliament intended to make the

(1) 1 Burr. 579, 589.

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payment of tithe rentcharge when it is due enforceable against them. It may be, of course, that Parliament in enacting these provisions has laid too heavy a burden upon owners of land. It may be that the machinery created by these provisions is objectionable in various ways. If so, it is perfectly legitimate to conduct an agitation in order to have those provisions altered. Also, of course, everybody has a perfect right to take any legal objection which is sound to this or to any other form of legal procedure. But before we admit the sort of objections to which we have listened on behalf of the respondent it is undoubtedly relevant to consider carefully what the nature and the object of them is. I think nobody who has considered the facts proved can doubt that these objections are technical objections raised with the object of furthering the movement for preventing those who are the legal owners of tithe rentcharge from recovering it when due, or at least for making it as difficult as possible for them to recover it. I do not think I need read again the passages from the judgment of the learned judge which appear to put beyond doubt the existence of this movement, and the object of the resistance which has been offered by the respondent in this case to the recovery of the tithe rentcharge. These matters are, in my judgment, unanswerably established by the facts found by the judge. I take only one instance. He finds that the respondent told the bailiff that if the ricks were put up for auction he would get all the farmers in the neighbourhood to prevent the sale. Everybody who knows anything about the country is aware that there are not many things which farmers in any neighbourhood can be got to do in concert. That finding shows quite clearly that the respondent knew, what no doubt was the fact, that almost every farmer who was asked to come and prevent the sale of these ricks would gladly comply with the request, and that the respondent contemplated preventing the distress with the help of the other farmers.

I need also say only a word in regard to the other ground of appeal—namely, the mistake as to the value of the goods seized on which learned counsel laid a great deal of emphasis.

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Why is a mistake in value relevant to this question of the second distress? The principle upon which a second distress is allowed in exceptional cases is very clearly indicated by Kennedy J. in a single sentence in the case of *Grunnell* v. *Welch* (1), the facts of which have nothing to do with this case: "The rule that a landlord cannot distrain a second time for the same rent is based upon the possibility of the landlord having satisfied himself out of the first distress." That is the principle. Illustrations of it are to be found in cases where the goods originally distrained are of a particular kind, such as are mentioned by Lord Mansfield in the case of *Hutchins* v. *Chambers* (2), or where the circumstances have been such as to make it impossible to distrain. Whether it be a landlord's distress for rent, or a distress for poor rate, or a distress for tithe rentcharge there is not the least difference in the principle. The learned judge having found that the value of these ricks was approximately 170*l.*, says that there is no evidence here that the bailiff could have made any mistake at all as to their value. He took that view apparently because what he calls the market value of the goods seized was amply sufficient to realise the amount needed. So it was, if the bailiff had been left free to realize it. But "value" in this context obviously does not mean a value which in other circumstances and in other places could be obtained for the goods. It means what the goods could be sold for under the conditions and in the place in which they had to be sold. It is clear that to say that there was here no mistake in value is to form an entire misconception of the true meaning of words.

I think the same or a similar criticism applies to another observation of the learned judge, though perhaps not so strongly—namely, that there was no evidence that the respondent himself was in any way preventing tenders being given. That observation is perhaps true if taken literally. That is to say, the court having ordered that as ancillary to distress the method of inviting tenders might be adopted,

(1) [1905] 2 K. B. 650, 651; [1906] 2 K. B. 555.
(2) 1 Burr. 579, 589.

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there is no evidence that the respondent went round and persuaded his friends and acquaintances not to tender. But that he knew that in fact there would be no such tender as there would have been in ordinary circumstances, if property of a market value approaching that of these ricks was going to be sold, is really perfectly clear. The situation was that the respondent who owed 30*l.* odd for tithe rentcharge had on his land property—namely, hay—of a very marketable character, which in ordinary circumstances and apart from this particular difficulty would fetch 170*l.* He himself for his own hay tenders 10*l.* and he refuses to tender any more. That tender is accepted, there being no other tender except one of 9*l.* It is idle to suggest that the respondent did not know and had not the best of reasons for knowing that no one else would tender. He also no doubt knew that no one else would tender because of the difficulty of getting the goods away if they were bought. I do not think I need add anything further. It seems to me for the reasons which have been given by my Lord and by the learned Lord Justice, with which I entirely agree, that it is impossible for us to say that the decision of the county court judge can be supported, and that it is our duty to send the case back to him with an intimation of our opinion in order that he may reconsider the matter.

Appeal allowed. Cases remitted.

Solicitors for appellants: *Withers & Co., for P. H. Jackson, Fordingbridge, Hants.*

Solicitors for respondent: *Collyer-Bristow & Co., for A. B. Lemon, Salisbury.*

Solicitors for Commissioners of Church Temporalities in Wales: *Deacon & Co.*

J. R.

THE KING *v.* WEST MIDLAND TRAFFIC AREA LICENSING AUTHORITY.

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Motor-car—Goods vehicle—Licence—Application for B licence—Notice—Whether licence must be limited as to area of user—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *ss.* 2, 5, 11—*Practice—Order of Licensing Authority quashed by Divisional Court by certiorari—Decision of Divisional Court reversed—Power of Court of Appeal to order writ of supersedeas and procedendo.*

In applying under the Road and Rail Traffic Act, 1933, for a B licence in respect of a motor vehicle the applicant is only bound to state the district which, or the places between which, he normally intends to use the vehicle, and on such an application the licensing authority under the Act is entitled, if he thinks fit, to grant the licence without imposing any restriction as to the area within which the vehicle may be used.

Where a licence has been granted by the licensing authority under the Road and Rail Traffic Act, 1933, but has been quashed by a Divisional Court and a writ of certiorari has been issued, the Court of Appeal, on reversing the decision of the Divisional Court, can, under Order 58, r. 4, grant a writ of supersedeas and procedendo to restore the decision of the licensing authority.

Decision of Divisional Court reversed.

APPEAL from a Divisional Court.

In May, 1934, Hill & Long, Ld., applied under the Road and Rail Traffic Act, 1933 (1), to the West Midland Traffic Area Licensing Authority for a B licence for two motor vehicles, stating in their application the place of their head office—West Bromwich ; the nature of their business—" furniture removing and delivery of furniture " ; the " district in which or places between which the vehicles will normally be used," namely, " Birmingham, Wolverhampton, Sutton, Hagley." In accordance with s. 11, sub-s. 1, of the

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(1) Road and Rail Traffic Act, 1933, s. 2 : " (1.) Licences shall be of the following classes :—(*a*) public carriers' licences ; (*b*) limited carriers' licences ; (*c*) private carriers' licences. . . . . (3.) A limited carriers' licence (in this Part of this Act referred to as 'a B licence') shall entitle the holder thereof to use the authorised vehicles, as he thinks fit from time to time, either for the carriage of goods for or in connection with any trade or business carried on by him, or, subject to any conditions which the licensing authority,

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Act, the licensing authority published in the prescribed manner the application of Hill & Long, Ld., the material words of which were these: "Furnishers and furniture removers. Furniture, Wolverhampton, Birmingham and district."

No objector appeared to oppose the grant of the licence, and it was thereupon granted in this form: "Hill & Long, Ld., two vans, 3¼ tons, furniture and household effects, any distance."

The Great Western Railway Company, on becoming aware of the terms of the licence granted, obtained a rule nisi for a writ of certiorari directed to the licensing authority to bring up the licence for the purpose of being quashed on the ground (inter alia) that the licensing authority had no power to grant a B licence with an unlimited area of operation.

The Divisional Court (Lord Hewart C.J. and Avory and Swift JJ.) made the rule absolute. In their opinion looking at the form of application and the fact that persons who might be affected by the grant of a licence were given a right to object, the licensing authority had no jurisdiction without notice and behind the backs of potential objectors (of whom the Great Western Railway Company were one) to enlarge or extend the area to which the application applied and which by its terms limited the places between which the vehicles

in the exercise of his discretion to attach conditions to a B licence, may attach to the licence, for the carriage of goods for hire or reward."

Sect. 5: "(1.) A person applying for a licence shall submit to the licensing authority a statement in the prescribed form— . . . . (*c*) specifying, in the case of an application for an A licence or a B licence, the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward."

Sect. 11: "(1.) The licensing authority shall publish in the prescribed manner notice of an application to which this section applies specifying the time within which, and the manner in which, objections may be made to the grant of the application. . . . ."

"(3.) This section shall apply to every application for the grant . . . . of an A licence or of a B licence. . . . ."

would be used to Birmingham, Wolverhampton, Sutton and Hagley.

The licensing authority appealed.

Sir Thomas Inskip A.-G. and *Wilfrid Lewis* for the appellant. The Divisional Court was wrong in holding that the licensing authority had no jurisdiction to grant the licence without imposing restrictions as to the area in which the applicants' motor vehicles could be used. In so deciding the Divisional Court has in effect deleted the word "normally" from s. 5, sub-s. 1 (*c*), of the Road and Rail Traffic Act, 1933. The requirements of the Act as to the form of the application and its publication were duly satisfied, and the railway company had all the notice which the Act entitled them and all other potential objectors to receive—namely, the statement of the districts within which the applicants' vehicles would normally be used. No doubt, in the case of a B licence the licensing authority, if he thinks fit, can attach conditions to the licence, but in this case he did not do so, probably because he considered that it would impose an undue restriction on the business activities of the applicants as furniture removers, as they no doubt are often called upon to transport furniture from one district to another, conceivably on the other side of England.

Monckton K.C., *Morrison K.C.*, and *B. de H. Pereira* for the respondents. In dealing with B licences the Legislature had in mind the elimination of wasteful competition, and to enable that intention to be carried out the Legislature has required that full information shall be given as to the area within which the vehicles are to be used. The distinction between an A licence and a B licence must always be kept in view. The Act leaves the public carrier who obtains an A licence unfettered as to the area within which he can use his vehicle, but in the case of a B licence, which it will be noted is in s. 2 called "a limited carriers' licence," there has obviously to be imposed a limit on the area to be served. Further, it is implicit in the language of the Act that in his application for a B licence the applicant must disclose what

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he is really asking, so that possible objectors may have the opportunity of appearing and opposing the application. Merely to say, as was stated in the publication of this application, that the vehicles were to be used in the district of Birmingham, Wolverhampton, Sutton and Hagley led the respondents to assume that the statement was exhaustive as to the area within which the vehicles would operate. While the respondents do not object to the use of the vehicles within that specific area they do object to the wide terms of the licence granted. The Divisional Court was therefore right in quashing the licence.

Wilfrid Lewis in reply. Licences granted under the Act are not for districts; they are granted for vehicles, and there is no prima facie restriction on the areas within which they may be used. No obligation is imposed by the Act on the applicant to state in what area he proposes to operate; he is only required to state "the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward."

[He was stopped.]

Greer L.J. This is an appeal from a judgment of the Divisional Court whereby it was ordered that a decision of the licensing authority in relation to an application by Hill & Long, Ld., under the Road and Rail Traffic Act, 1933, should be quashed.

The facts are these: On May 7, 1934, Hill & Long, Ld., made an application in the statutory form for a B licence for two vehicles, and the application stated, as required by the Act, the districts in which, or places between which, the vehicles were normally to be used. The applicants did not state, and were under no obligation to state, the district or area in which they proposed to use the vehicles for which they were asking the licence. That application was published in a document which is issued from time to time by the authority called "Applications and Decisions," and was included in the class of applications described as "Applications for B Licences," this being the statutory way in which notice is given to persons who may be entitled to object to the grant of the licence, or if they desire to insist that the licence should not be granted as prayed but should only be granted in a limited way by the application of conditions. The notice advertised in this document is in these words: "Number 3062. Hill & Long, Ld., 312–314, High Street, West Bromwich." That is what is called the base of their operations—their head office or head establishment. Then: "Nature of business. Furniture removing and delivery of furniture." There follows a description of the vehicles; then the word "Furniture," stating what they were going to carry. Next come these words: "Districts in which, or places between which, the vehicles will normally be used: Birmingham, Wolverhampton, Sutton, Hagley." It must be assumed, for the purposes of this case, that persons are familiar with the terms of this Act of Parliament and must know that when an application for a B licence is made it is not and can never be, as Mr. Lewis has reminded us, an application for a licence for vehicles to run in any particular district; it can only be an application for a B licence with information which the applicants are bound to give as to where they are normally going to use their vehicles; and these words, "Wolverhampton, Birmingham and district," must be interpreted as meaning, not the district to which their B licence is to be confined, but the district in which they normally or usually intend to use the vehicles. When the application was considered by the Commissioner, he granted a licence in this form: "Hill & Long, Ld., two vans, 3¼ tons, furniture and household effects, any distance." That was a licence which the Commissioner was entitled to grant; it was not something which was not covered by the original application. If the application had been converted into something different from that which it originally was there would be great weight in the arguments which have been put before us that in a judicial, or semi-judicial, capacity, the Commissioner should not have proceeded with it without fresh notice, and an opportunity given to people who, although they might reasonably have been contented to let the original application be granted, had serious objections to a different application being considered and dealt with by the Commissioner. But that is not this case.

To understand the position it is necessary to consider some of the sections of the Act. Sect. 1 prevents people using vehicles on the road for the carriage of goods without being licensed. Sect. 2 divides licences into three kinds: Public carriers' licences, Limited carriers' licences, and Private carriers' licences. The words "Limited carriers' licences" are not very accurate to describe the B licences, as they may or may not be limited, according as the licensing authority imposes, or does not impose, conditions. If the licensing authority does not impose conditions the licence granted is an ordinary B licence which is dealt with in s. 2, sub-s. 3, in these words: "A limited carriers' licence (in this Part of this Act referred to as 'a B licence') shall entitle the holder thereof to use the authorised vehicles, as he thinks fit from time to time, either for the carriage of goods for or in connection with any trade or business carried on by him, or, subject to any conditions which the licensing authority, in the exercise of his discretion to attach conditions to a B licence, may attach to the licence, for the carriage of goods for hire or reward." That sub-section makes no provision for an application limited to particular places. The application is one for a B licence which may be for the carriage of the applicant's own goods only, or may be subject to any conditions which the licensing authority in the exercise of his discretion may attach to a licence for the carriage of goods for hire or reward, not for the carriage of goods for hire or reward in defined districts, but for the carriage of goods for hire or reward generally. Sect. 3 puts a limit on the period of time to which the licence is to extend. In the case of a B licence it is only for one year, so that if it were found during the year that Hill & Long, Ld., had really in practice not normally been using their vehicles in the district they named in their application, but using them largely to create businesses in other districts, that could quite easily and properly be urged against them when they applied for the renewal of their licence. Sect. 5, which is the only section in the Act requiring the applicant to state any place or district in the application, is in these terms: "A person applying for a licence shall submit to the licensing authority a statement in the prescribed form—. . . . (*c*) specifying, in the case of an application for an A licence or a B licence, the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward." I think the word "normally" points to the district in which it is intended that the authorized vehicles will generally or usually be used for the purpose of carrying goods for hire or reward. That was done in this case. Sub-s. 2 requires the applicant to give any further information that the licensing authority wants. Sect. 6 is directed to what the licensing authority has to consider. Sub-s. 2 says: "The licensing authority in exercising his discretion shall have regard primarily to the interests of the public generally, including those of persons requiring, as well as those of persons providing, facilities for transport, and, in particular, shall have regard in the case of an application for an A licence or for a B licence"—to certain matters mentioned in the sub-section, including the number and type of vehicles proposed to be used under the licence. Later, it is stated in the same sub-section: "in the case of an application for a B licence, also to the extent to which the applicant intends that the vehicles proposed to be used under the licence shall be used for the carriage of goods for hire or reward." That, no doubt, is a matter which the licensing authority has to consider. Sect. 8, sub-s. 3, gives power to impose conditions in these terms: "Subject to the provisions of subsection (3.) of the last preceding section, the licensing authority may in his discretion attach to a B licence, as respects the user of the authorised vehicles, or any of them, for the carriage of goods for hire or reward, all or any of the following conditions, that is to say—(*a*) a condition that they shall be so used only in a specified district or between specified places." If, however, such a condition is not imposed by the licensing authority the licensee will be able, on the grant of his licence, to use his vehicles not limited to specified districts or specified places. Sect. 11, sub-s. 2, which was the provision mainly relied upon by the respondents in support of the judgment of the Divisional Court, is in these terms: "It shall be the duty of the licensing authority, on an application to which this section applies, to take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve, on the ground that suitable transport facilities in that district, or between those places, are or, if the application were granted, would be, either generally or in respect of any particular type of vehicles, in excess of requirements, or on the ground that any of the conditions of a licence held by the applicant has not been complied with." It has been argued that the licensing authority can grant a licence only in specified places which the applicant by his notice shows that he intends to serve. I think that is putting something into the section which is not there; it is imposing upon the applicant an obligation to confine his application to certain districts, or certain places. In my judgment the respondents are in a dilemma. Either they had notice of what the application was, and that notice should have conveyed to their minds that the application might be granted unconditionally, in which case they could have objected, or, if that is not so, they have no grievance, because they received the only notice which is provided for by the statute. The net result of the respondents' argument is that they are asking from the Court, and they have really obtained from the Divisional Court, a revision of this Act of Parliament limiting the kind of application in a way not limited by the Act, by treating the application as one for a licence for a particular district or for the carriage of goods between certain defined places. I have considerable sympathy with the respondents' point of view, as I feel that there quite reasonably might have been imposed

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upon the applicants an obligation to state, not merely where they intend normally to use their vehicles, but the districts in which they intend to use them when they are using them for hire. But for reasons which may or may not have commended themselves to Parliament, no such limitation is put upon the kind of licence to be applied for or the kind of notice to be given which would enable objectors to have their objections heard. It may be that Parliament, when they passed s. 11, thought that such a condition was involved. I am, however, not confident about that, and I am inclined to think that it was regarded as right and proper that licences for the carriage of goods, A or B licences, should not have limits assigned to them except in cases in which the licensing authority thought it reasonable and proper to impose such limits, and that unless such limits were imposed, applicants should be free to carry, not only where they normally carry, but from that district to any other district. That is obviously convenient in the case of a furniture remover, as it is quite impossible for him to define the area within which he desires to have a licence without including the whole country, even although it may be only once or twice a year that he may be called upon to take his vehicles out of the district in which he normally uses them. It would be an unreasonable restriction on his business if he were confined to the removal of furniture in a particular area, seeing that he has to deal with customers domiciled in one district who may want to move to another district. The interests of other carriers are sufficiently protected by the fact that the B licence only operates for a year, and if the liberty is found to be abused by setting up business in districts other than those where the applicant normally carries on his business, that can be met, either by a refusal of the licence the next year or by the imposition of conditions. As I have said, I have a certain amount of sympathy with the respondents, and I can quite easily understand why, if attention is concentrated, as it was in the Court below, on s. 11, sub-s. 2, it might readily be forgotten what had been provided in the earlier parts of the Act.

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In my judgment, therefore, although the question is not free from difficulty, the appeal succeeds and must be allowed with costs.

SLESSER L.J. This is an appeal from a judgment of the Divisional Court ordering the issue of a writ of certiorari directing the licensing authority for the West Midland Traffic Area, constituted under the Road and Rail Traffic Act, 1933, to remove into the High Court for the purpose of being quashed a decision, dated September 17, 1934, by which a certain licence was granted to Hill & Long, Ld., to use two specified vehicles for the purpose of carrying furniture and household effects.

On May 7, 1934, Hill & Long, Ld., of West Bromwich, made application to the West Midland Licensing Authority for a limited (B) carriers' licence. In accordance with the requirements of the prescribed form of application they stated, as their base or centre from which the vehicles would normally be used for the carriage of goods for hire or reward, 312 and 314 High Street, West Bromwich. In answer to the question " Nature of business," they replied " Furniture removing and delivery of furniture." " Class or description of goods to be carried "—" Furniture," and " Districts in which, or places between which, the vehicles will normally be used? ", " Birmingham, Wolverhampton, Sutton, Hagley." This application was in accordance with s. 5, sub-s. 1 (*c*), of the Act, which requires that a person applying for a licence shall submit to the licensing authority a statement in the prescribed form (*c*) " specifying, in the case of an application for an A licence or a B licence, ... particulars of the district within which, or the places between which, it is intended that the authorised vehicles will normally be used for the purpose of carrying goods for hire or reward." Those are the material provisions. The B licence here applied for entitles the holder to use the vehicles for the carriage of goods in connection with his business, or, subject to any conditions which the licensing authority, in his discretion, may attach, the carriage of goods for hire or reward. Such a licence, therefore, may have regard to two purposes, the licensee's own business, and the carrying for reward.

In the case of an application for an A licence, the requirements being similar to those prescribed for the B licence, there is no general power in the licensing authority to impose conditions.

In my view, the application for a B licence, although described as a limited licence in the Act, like an application for an A licence, is primarily for one without conditions, though conditions may be imposed under s. 8, sub-s. 3. I cannot agree with the view expressed by the learned judges in the Court below that the effect of the application was to limit the places between which the vehicles would be used. It is true that, in accordance with the requirements of s. 5, sub-s. 1 (*c*), the particulars of the district within which, or the places between which, it is intended that the vehicles will normally be used, have to be stated, and that statement may have importance when the licensing authority is considering what conditions, if any, as to district or place he will impose upon a B licence, or whether he will grant either an A licence or a B licence at all; but the use of the word "normally" assumes, to my mind, that it is possible that from time to time—abnormally—the applicant may desire to use his vehicle otherwise than in its normal area of employment. It is significant that in the case of an A licence, where admittedly the authority cannot impose conditions, precisely the same information has to be given by the applicant.

By s. 11, sub-s. 1, a duty is imposed upon the licensing authority to publish in the prescribed manner notice of an application to which the section applies, stating the manner and time within which objections may be made. There is no other obligation, save under this section, to make such a publication.

On June 4, 1934, the licensing authority duly published in the record of applications the application by Hill & Long, Ld., the material words of which were: "Furnishers and furniture removers. Furniture, Wolverhampton, Birmingham, and district."

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The principal difficulty which arises in this case must now be mentioned. Although s. 5, sub-s. 1 (*c*), requires the district within which, or places between which, it is intended that the authorized vehicle will normally be used to be stated, s. 11, sub-s. 2, states the duty of the licensing authority, on an application to which the section applies, to take into consideration any objections to the application which may be made by persons for the carriage of goods for hire or reward in the district, or between the places which the applicant "intends to serve," and it is argued for the Great Western Railway Company, who obtained the rule, that by saying that when the applicants named districts in which, or places between which, the vehicles would normally be used, they had defined, exhaustively, the districts which they intended to serve. This would appear to have been the view of the Divisional Court, when, in the language of the Lord Chief Justice, "there might be an application in terms confined to a very limited area." As I have said, I cannot agree with this view. I think, to make the legislation consistent, the word "normally" must be inserted before "intends" in s. 11, sub-s. 2, so that it reads back and refers to the application made under s. 5, to which objection might be taken, for s. 11, like s. 5, is dealing with the application, and goes on to deal with objections to it. The application is not confined to the normal area of service, but is for a B licence as such, which, under s. 2, sub-s. 3, may be subject to conditions, or may be issued without conditions, as the licensing authority, in his discretion, may think fit. Again, it is to be noticed that that part of s. 11 also applies to objections to an A licence where conditions cannot be applied for to a licensing authority. In other words, the application which was published gave to the Great Western Railway Company all the notice which they were entitled to receive, and gave them information as to the normal intention of service, and normal user, which they could utilize in argument in asking for conditions or rejection of the application, just as the authority might use the information to guide his ultimate judgment; but when the notice of application was given, if the Great Western Railway Company wished to take objection to the grant of a licence they were bound to do it within the prescribed time, that is, not later than fourteen days after the publication of the application. In fact, the railway company did not appear to object, nor was there any other objection, and on September 17, 1934, the decision of the authority was duly promulgated which made it a condition that the vehicles, so far as they were to be used for hire or reward, should be limited to the carriage of furniture and household effects; but although the applicants stated that their normal user was in the Birmingham and Wolverhampton district, the licence was granted for "any distance."

In my opinion it was within the power of the licensing authority to impose no condition as to distance. I can find in s. 2, sub-s. 3, no obligation to impose conditions, but rather a complete discretion in the authority to impose them or not as he thinks fit. Consequently, I can find no irregularity in the proceedings, or anything invalid in law.

It has been argued by Mr. Monckton and Mr. Morrison that so to hold will be to make objection almost impossible. I cannot take that view, but, if the statute does produce embarrassment in that the would-be objector can never be certain that the authority will not grant a licence to extend beyond the area of normal user, or if the objector only objects to an area beyond that of such normal user, he will be unable to decide in advance whether to take an objection or not, the remedy must lie elsewhere.

If it be desired to grant an application in respect of vehicles, other than those of which particulars are contained in the application, the authority must publish notice of that proposal as if it were an application to which s. 6 applies, subject to a provided exception, and thereupon the provisions of s. 11 with respect to the making, and consideration, of objections shall apply accordingly: s. 11, sub-s. 6. The reference to a variation of an A licence in the proviso to s. 11, sub-s. 2, refers, I think, to such a provision in sub-s. 6, or other specific variations contemplated by the statute. It is to be noted that no such provision is made with regard to the general application, as I think it is, for a B licence, as distinguished from that part of the application which names specific vehicles; and if similar machinery is desired to bind down the applicant or the authority to specified areas with a power to the authority to vary them only on condition that such variation shall be treated like a variation of the vehicles under s. 11, sub-s. 6, legislation will, in my judgment, be necessary to produce that result. As matters stand, the language of the Act is too intractable to remedy the difficulties which the objectors urge.

I agree that this appeal succeeds, and that the order for certiorari must be discharged.

ROCHE L.J. I agree that this appeal should be allowed, although I have arrived at that conclusion with some reluctance. My reluctance is due, not to any question of law, although the construction of this statute is far from easy, particularly having regard to the dissimilarity of the language used in ss. 5 and 11. On that matter I have reached a clear conclusion that, for the reasons given by the Lords Justices who have given judgment, the construction which they have put upon the Act is correct. My reluctance is due to this, that I cannot help feeling that if it were possible to adopt it the construction put upon the Act in the very lucid and able arguments of Mr. Monckton and Mr. Morrison for the respondents would give a result probably more just, and certainly more sensible and consistent, than the construction to which I feel we must give effect. There is indeed a practical difficulty which I do not fail to recognize. It is eminently desirable that in regard to these applications persons, other than the applicants, who are concerned in the matter should, in proper cases, be enabled to object. It is equally desirable that they should not be put to the trouble and expense of objecting in cases where their interests are not really affected. It is also important that the licensing authority should not be plagued or snowed under by a large number of objectors. In those circumstances, if s. 5 and s. 11 combine in such a way that it became necessary for the applicant to state what he really wanted in the way of all licences, in my judgment those objects would be better achieved than they are under the construction of the Act which we are forced to adopt. From the records of the decisions in the cases of applications for B licences which this licensing authority has published, pursuant to its statutory obligations, it appears that, as a rule, B licences are granted with what I may call a local condition confining the applicant to a certain district of operations, and it is no doubt owing to that fact that the idea has arisen that B licences are of that nature. That impression is certainly confirmed and strengthened by the use by the Legislature of the word "limited" with regard to B licences in s. 2. The fact is that, having regard to the very nature of the business of persons applying for B licences, which requires them to use them for their own business as well as for other people's businesses, the operations are, as a rule, local. Accordingly the impression has been created that B licences are essentially local in character. That is not, however, the effect of the sections, with the result that persons concerned with matters such as these who are in the position of the railway company in this case, must take note of the fact that this licensing authority seems to allow greater latitude to furniture removers, for reasons which seem to him to be good, than to other people. From this record of decisions it is apparent that in the case of all furniture removers he does not allow such a large liberty as he has allowed to the applicants in this case. If that be the result of the perusal of the decisions, this railway company must, until the Legislature makes some other enactment on the point, act upon the view that they may be concerned in all applications of this nature, and may have to give notice of objection as a matter of precaution which they would not otherwise be disposed to give, lest wide and unconditional licences may be granted which, in their view, are unnecessary and detrimental to their interests.

In the result I agree that this appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords granted.

Feb. 4. *Wilfrid Lewis* for the appellant. The writ of

C. A.
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certiorari quashing the order of the licensing authority having issued under the order of the Divisional Court and this Court having reversed the decision of the Divisional Court, it is necessary that a writ of supersedeas and procedendo should issue to restore the licence originally granted. Merely reversing the decision of the Divisional Court does not have this effect. [He cited *Ord* v. *Robinson* (1); *Reg.* v. *Mann* (2): Short and Mellor's Crown Office Practice, 2nd ed., p. 569; Order LVIII., r. 4.] If the writ now asked for is granted, it can lie in the office till the appeal to the House of Lords is decided or otherwise disposed of.

B. de H. Pereira for the respondents. As the licence has been quashed there is nothing upon which the writ now asked for can operate. The proper procedure is to begin de novo.

GREER L.J. The Divisional Court having decided that the licensing authority had no power to grant a B licence unrestricted as to the area in respect of which the vehicles could be used, this Court decided that the Divisional Court took a wrong view as to the effect of the Road and Rail Traffic Act, 1933, but pending the appeal the writ of certiorari was treated as an effective writ and the decision of the licensing authority was in fact quashed. As we held that the decision of the licensing authority was right it ought not to have been quashed by certiorari. We have now been told, and rightly told, that unless something is done, the quashing of the licensing authority's decision will continue operative and the applicants for the licence will have to apply again. What then is necessary to be done to enable the licensing authority to act upon the view stated in our judgment? To put matters right we are asked to grant a writ of supersedeas and procedendo. We have in a proper case power under s. 27 of the Judicature Act, 1925, Order LVIII., r. 4, and r. 206 of the Crown Office Rules, to grant such a writ in order to give effect to our judgment. We are all of opinion that it would be a gross injustice to the applicants for the licence if the writ and its execution which we held to have been wrongly ordered were

(1) (1837) W. W. & D. 593.

(2) (1873) L. R. 8 Q. B. 235.

left operative notwithstanding our decision. It is, however, boldly argued on behalf of the railway company that a writ of certiorari once issued cannot be undone notwithstanding a decision of the Court of Appeal or even a decision of the House of Lords. I should be sorry to think that our power to interfere in such a case is so slight that it is impossible for us to do that which is reasonably necessary to give effect to our decision. We have power to do that which we are asked to do, and it ought to be done; but in the circumstances, and to obviate any difficulty, we think that the writ should lie in the office for fourteen days, and if the necessary steps are taken by the railway company to appeal to the House of Lords the writ will continue to lie in the office until the disposal of the appeal. The writ, with the necessary modifications, will be in the form set out at p. 569—No. 170—of Short and Mellor's Practice on the Crown Side (2nd ed.).

SLESSER L.J. I agree. In *Minister of Health* v. *The King* (1) the House of Lords took a different view as to the powers of the Minister of Health under the Housing Act, 1925, from that taken by this Court and reversed our decision. Thereafter we are informed that an application was made to the Divisional Court to make the order of the House of Lords an order of the King's Bench Division and at the same time that a writ of procedendo should be granted, and that was issued. By Order LVIII., r. 4 (which by r. 206 of the Crown Office Rules is to apply to all civil proceedings on the Crown side), this Court can "make any order which ought to have been made, and make such further or other order as the case may require." In this case it is necessary in the interests of justice that the Court should make the order asked for.

ROCHE L.J. I agree.

Order accordingly.

Solicitor for licensing authority: *Treasury Solicitor.*

Solicitor for Great Western Railway Company: *A. G. Hubbard.*

J. S. H.

(1) [1931] A. C. 494.

1934
Dec. 12, 13.

McKENNA (H.M. INSPECTOR OF TAXES) *v.* EATON-TURNER.

Revenue—Income Tax—Person residing in the United Kingdom—Earnings from Employment abroad—Main part of remuneration paid in England—Liability to tax—" Annual profits or gains . . . . from any . . . . employment . . . . carried on in the United Kingdom or elsewhere "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 1, 149, *Sch. D, para.* 1 (*a*) (*ii.*), *Case II., Sch. E—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18.

The respondent was employed by an English company, under agreements which provided that the whole of his duties were to be performed at the company's property abroad. Assessments were made on him for the years from 1926–7 to 1933–4 under Sch. E. The Commissioners found that the respondent was resident in the United Kingdom at all material times. Throughout the period of the assessments the respondent spent part of each year in England. Under the agreements of service a small portion of his remuneration was paid to the respondent at the company's property abroad, but the main part of his remuneration was paid into his bank in London:—

Held, that the respondent's case was covered by the words of Sch. D, para. 1 (*a*) (ii.), of the Income Tax Act, 1918, which were: " Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing . . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere," and the result of the Finance Act, 1922, s. 18, was to transfer such a case to Sch. E. The respondent was, therefore, liable to be taxed under Sch. E.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent, Mr. G. W. Eaton-Turner, appealed against assessments which had been made on him to income tax for the years from 1926–7 to 1933–4 under Sch. E.

It was admitted that the respondent, for all the years in question except the first year, was resident in the United Kingdom, having a wife and children living here, and a house from and after June 11, 1926. It was disputed whether he was a resident for the year 1926–7, but the Special Commissioners held that he was a resident also for that year.

During the years in question the respondent was employed first as assistant manager and afterwards as manager by the

Ashanti Goldfields Corporation, Ld., an English company which carried on a gold-mining business in West Africa. The agreements under which the respondent was employed provided, with two minor exceptions, that the whole of the respondent's duties were to be performed at the company's property in West Africa. The exceptions were the agreements of September 2, 1932, and July 5, 1933, which provided that the respondent should attend at the company's offices, when in London. These agreements also provided for the payment of a small portion of the respondent's remuneration in West Africa. The main portion of his remuneration was paid into his bank in London. The Special Commissioners, after hearing evidence, were satisfied that before the agreement of September 2, 1932, no part of the respondent's work or duties fell to be or was performed in the United Kingdom.

On behalf of the respondent it was contended (i.) That he was not chargeable under Sch. E in respect of any part of the moneys paid to him under the agreements ; (ii.) That all his duties were performed at the company's property abroad, and that his office was not an office or employment of profit within the United Kingdom for any of the years of assessment ; (iii.) Alternatively, that this was the position down to September 7, 1932, on which date the respondent first held a separate office involving the performance of duties in the United Kingdom ; (iv.) That it was irrelevant that the respondent was a person residing in the United Kingdom for any of the years of assessment or that part of his remuneration was paid to his account here.

On behalf of the inspector of taxes it was contended that the respondent's employment came within the charge of Sch. D, para. 1 (*a*) (ii.), Case II. (as transferred to Sch. E by s. 18 of the Finance Act, 1922), as the main part of his remuneration was payable and was paid in the United Kingdom. As regards the agreement of September 2, 1932, and the subsequent agreement of July 5, 1933, it was contended that the respondent had one employment, part of which fell to be performed in the United Kingdom, and that the division purported to be effected by the agreement of July 5, 1933, was unreal.

The Commissioners who heard the appeal held that the respondent did not fall within the charge of Case II. of Sch. D (as transferred to Sch. E) before September 7, 1932, and they discharged the assessments so far as they related to earnings for periods before that date.

The inspector of taxes appealed.

Sir Donald Somervell S.-G. and *R. P. Hills* for the appellant.
R. W. Needham K.C. and *Cyril King* for the respondent.

Singleton J. [referred to the facts and contentions and said :] By the Income Tax Act, 1918, Sch. D : " 1. Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing . . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." It is said that this case falls under Case II. of Sch. D, which is : " tax in respect of any profession, employment, or vocation not contained in any other Schedule." It seems to me that the question which I have to decide is whether or not the circumstances of Mr. Eaton-Turner's case are covered by that portion of Sch. D of the Income Tax Act, 1918, which I have just read.

My attention has been called to a number of authorities. The first case cited was *Colquhoun* v. *Brooks*. (1) The headnote of that case is : "A person resident in the United Kingdom and engaged in a trade carried on entirely abroad is liable to income tax in respect of so much only of the profits of that trade as are received in the United Kingdom. The respondent, who resided solely in England, was a partner in a firm which carried on business in Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England and on this portion he paid income tax under Sch. D. The larger portion of his share was not remitted to him in England, but was placed to his credit in Australia :—*Held*, affirming the decision of the Court of Appeal (2) but not for the reasons given by the majority of that Court,

(1) (1889) 14 App. Cas. 493.
(2) (1888) 21 Q. B. D. 52.

that the case fell under the head of 'possessions in any of Her Majesty's dominions out of Great Britain, or foreign possessions' dealt with by the fifth case of Sch. D . . . . ; and that the respondent's portion of profits not received in the United Kingdom was not liable to income tax."

In that case, Lord Fitzgerald, in dealing with Sch. D, said (1): "The language of 16 & 17 Victoria, chapter 34, s. 2, Schedule D is so comprehensive that I doubt whether a net of language could be devised stronger and more apt to include the profits arising or accruing to the respondent from a business carried on elsewhere than in the United Kingdom, and must and ought to have full effect, unless we can infer from the other provisions of the particular Act or of the Code that it was not the intention of the legislature to tax income from trade carried on wholly and solely elsewhere than in the United Kingdom unless and until it has actually come to the United Kingdom as the income of some person residing in the United Kingdom." Lord Herschell said (2): "The claim of the Crown is based upon the terms of Schedule D, which impose the tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any trade whether carried on in the United Kingdom or elsewhere. The respondent does reside in the United Kingdom, profits did arise or accrue to him from a business carried on elsewhere than in the United Kingdom; therefore, say the learned counsel for the Crown, the case is within the very terms of the Act, and he must be held liable to assessment." That was the argument as put forward by the Crown in *Colquhoun* v. *Brooks* (3), and Lord Herschell, in dealing with that argument, said (4): "It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act. It is contended by the respondent that if we thus seek the aid to be derived from other provisions of the Income Tax Acts we shall be led to the conclusion that the view presented by the appellant is erroneous." Lord Macnaghten referred to the same matter, and it seems to me that the effect of what those three learned Law Lords said was that although the words of Sch. D were wide enough to bring the case with which they were dealing under Case I., an examination of the Act as a whole showed that the case they were dealing with fell under Case V.

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(1) 14 App. Cas. 493, 501.
(2) Ibid. 503.
(3) 14 App. Cas. 493.
(4) Ibid. 506.

In *Foulsham* v. *Pickles* (1) an agent in West Africa of a British company was assessed to income tax for the year 1919–20 under Case V. of Sch. D of the Income Tax Act, 1918, in respect of his earnings as agent. His duties were wholly performed in West Africa. Under his agreement with the company the commission which formed the bulk of his remuneration was payable by the company in the United Kingdom. The whole of this remuneration was paid by the company into a banking account in England on which his wife had the power of drawing. He rented and was the rated occupier of a house in the United Kingdom in which his wife and family resided. He spent a few days in the United Kingdom during the year of assessment. The Special Commissioners held on appeal that he was resident in the United Kingdom and that he was assessable to income tax under Case V. of Sch. D in respect of his earnings as agent. It was held that the Special Commissioners were entitled to regard him as resident in the United Kingdom, but that the earnings were not income from a foreign possession assessable under Case V. of Sch. D as the source of income was not wholly abroad.

Mr. Needham pointed out to me that when that case was in the Court of Appeal, Warrington L.J. said (2) that the decision in *Colquhoun* v. *Brooks* (3) did not go so far as the Solicitor-General contends that it did. Warrington L.J. said (2): " That being, as we hold it to be, an incorrect view, a very serious question arises whether, having regard to the judgments

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(1) [1925] A. C. 458; 9 Tax Cas. 261.

(2) [1924] 1 K. B. 323, 334; 9 Tax Cas. 261, 284.

(3) 14 App. Cas. 493.

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in *Colquhoun* v. *Brooks* (1), this gentleman can be assessed at all. It is not merely a question whether in some minor point of detail the Commissioners have made a mistake : it may be that the result of the judgments in *Colquhoun* v. *Brooks* (1) is that unless in such a case the taxpayer or the alleged taxpayer can be charged on the income remitted to this country from a possession abroad, he cannot be charged at all. In fact the question raises the very case which Lord Herschell hinted at in a passage in his speech in *Colquhoun* v. *Brooks* (2)." But the view which I take of the speeches in *Colquhoun* v. *Brooks* (1) encourages me to think that it went a little further than Warrington L.J. considered in his judgment in *Pickles* v. *Foulsham.* (3) The Solicitor-General cited a number of authorities to show that if you have in any statutory provision words which, taken by themselves, normally would cover a particular case, the only reason for going outside the statutory provision is that there is some exception shown within the provision itself, as the House of Lords found there was in *Colquhoun* v. *Brooks.* (1)

Looking at the speeches in the House of Lords in *Foulsham* v. *Pickles* (4), I am bound to say that there are passages which seem to me to show that the learned Law Lords in that case thought that a case such as the present would be within Case II. It is admitted that the facts in this case are indistinguishable for all practical purposes from those in *Foulsham* v. *Pickles.* (4) In that case Lord Cave L.C. said (5): " Your Lordships were asked, in the event of your holding that the respondent was not taxable under Case V., to send the matter back to the Special Commissioners with a view to their now assessing the respondent in respect of the same income under Case II. of Schedule D. My Lords, I am far from saying that the respondent could not have been assessed under that Case, or that the Court has no jurisdiction when Commissioners have proceeded under the wrong Case to remit the matter to them under section 149, sub-s. 2, of the Income

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(1) 14 App. Cas. 493.

(2) Ibid. 508.

(3) [1924] 1 K. B. 323; 9 Tax Cas. 261.

(4) [1925] A. C. 458.

(5) Ibid. 464.

Tax Act with a view to their making a proper assessment; but I do not think that such a course should be taken in the present instance." Then he gives his reasons. Lord Dunedin (1) said that he had nothing to add to what had been said by the Lord Chancellor on that matter. Lord Buckmaster said (1): " The respondent being a person residing in the United Kingdom, it would appear that he was liable to be taxed under Schedule D, subhead 1 (*a*) (ii.), in respect of annual profits or gains arising from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; but, as pointed out, he was in fact assessed under subhead 2, Case V.," and Lord Buckmaster referred to the matter again in the last paragraph but one of his speech.

As was pointed out in at least one judgment to which reference was made in the course of the argument, Sch. D of the Act of 1918, read in its ordinary meaning, is comprehensive in its terms: " Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing—(ii.) to any person residing in the United Kingdom from any . . . . employment, ... whether the same be . . . . carried on in the United Kingdom or elsewhere." I ask myself why does not that cover this case? If I had to construe those words, entirely apart from authority, I should find it difficult to see why the case of Mr. Eaton-Turner, as set forth in the case stated before me, is not covered by the words which I have just read. I see nothing to take it out in any way at all. It is admitted that it does not come within Case V. Mr. Needham, in his argument, said it might come under Case VI., being " tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule." The reason that it does not fall under Case VI. in my view is that it falls under Case II.

I wondered whether or not there was any complication to be found in the fact that we have not to deal with Sch. D now, but, by reason of the Finance Act, 1922, we have to

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(1) [1925] A. C. 467.

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look at Sch. E; and to see what is done it is necessary to refer to s. 18 of the Finance Act, 1922. I leave out the words in brackets in sub-s. 1 of s. 18, because they do not affect this case. Sect. 18, sub-s. 1, of the Finance Act, 1922, provides as follows: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E, and the rules applicable to that schedule shall apply accordingly subject to the provisions of this Act."

It is to be noticed that the first words of the sub-section are: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D." Then in order to find out what matters are taken from Sch. D to Sch. E, so that the rules applicable to Sch. E shall apply, one has to look at Sch. D to see what that Schedule includes. One of things which Sch. D includes is "annual profits or gains arising or accruing . . . . (ii) to any person residing in the United Kingdom from any . . . . employment . . . . carried on in the United Kingdom or elsewhere."

Before this amendment by the Finance Act, 1922, s. 18, Sch. E, included: "Tax under Schedule E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Schedule C, for every twenty shillings of the annual amount thereof." Before the amendment, Sch. E covered "public office or employment of profit," and in r. 6 of the rules applicable to Sch. E certain offices are named. The result of s. 18 of the Finance Act, 1922, is to bring those of the kind mentioned in Sch. D, para. 1 (*a*) (ii.), within and under Sch. E.

For these reasons, it seems to me that the decision of the Commissioners was wrong. This appeal must therefore be

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allowed and the case must be remitted to the Commissioners for the right amounts to be assessed.

Appeal allowed.

Solicitor for the appellant: *Solicitor of Inland Revenue.*
Solicitors for the respondent: *Dawson & Co.*

T. W. M.

1934
Dec. 18.

HAMMOND *v.* HANLON.

Licensing—Registered Club—Seizure and Removal of Liquor—Intention of unlawful sale—Sufficiency of Amount seized—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *ss.* 82, 96.

Sect. 82 of the Licensing (Consolidation) Act, 1910, applies to registered clubs as well as to other premises.

It is not a condition precedent to a presumption under s. 82, sub-s. 3, being raised that a person found on premises is there for the purposes of illegally dealing in intoxicating liquor, that the constable who has entered under a search warrant under s. 82, sub-s. 1, should have seized and removed any intoxicating liquor found therein.

In order to comply with s. 82, sub-s. 1, it is not necessary for the constable to seize all the intoxicating liquor found on the premises which there is reasonable ground to suppose is there for the purpose of unlawful sale. Hence where forty-six persons, non-members, were found on the premises of a registered club unlawfully dealing in intoxicating liquor the seizure of five glasses of beer was held to be a sufficient seizure.

Case stated by justices of the county of Durham.

At a court of summary jurisdiction sitting at Hebburn-upon-Tyne, an information was preferred by Joshua George Hammond (hereinafter called "the appellant") under the Licensing (Consolidation) Act, 1910, s. 82, sub-s. 3 (1), against

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(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 82, sub-s. 1: "Any justice of the peace, if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place within his jurisdiction, whether a building or not, in which that liquor is not authorised to be sold by retail, may in his discretion grant a warrant under his hand, by virtue

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Clara Hanlon (hereinafter called " the respondent ") for that she " on February 11, 1934 . . . . unlawfully was found on certain premises . . . . known as the Hebburn Branch Gasworkers and General Labourers Social Club and Institute, Limited, for the purpose of illegally dealing in intoxicating liquor contrary to the Licensing (Consolidation) Act, 1910 (called herein ' the Act ' (1)), s. 82, sub-s. 3."

The justices dismissed the information but stated this case. Upon the hearing of the information the following facts were proved or admitted :—

(1.) On Sunday, February 11, 1934, in the execution of a search warrant granted in pursuance of s. 82, sub-s. 1, of the above Act (1) the appellant entered upon the above premises, which was a duly registered club. (2.) The respondent, together with forty-five other persons who were neither members, guests of members nor affiliated members of the club, was found upon the premises, and it was proved to

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whereof it shall be lawful for any constable named in the warrant, at any time or times within one month from the date thereof, to enter, and if need be by force, the place named in the warrant, and every part thereof, and examine the same and search for intoxicating liquor therein, and seize and remove any intoxicating liquor found therein which there is reasonable ground to suppose is in the place for the purpose of unlawful sale at that or any other place, and the vessels containing the liquor."

Sub-s. 3 : " When a constable has entered any premises in pursuance of a warrant under this section, and has seized and removed liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on the premises for the purposes of illegally dealing in intoxicating liquor and be liable in respect of each offence to a fine not exceeding forty shillings."

Sect. 96, sub-s. 1 : " If a justice of the peace is satisfied by information on oath that there is reasonable ground for supposing that any registered club is so managed or carried on as to constitute a ground for striking it off the register, or that any intoxicating liquor is sold or supplied, or kept for sale or supply, on the premises of an unregistered club, he may grant a search warrant to any constable named therein."

Sub-s. 2 : " A search warrant granted under this section shall authorise the constable named therein to enter the club, if need be by force, and to inspect the premises of the club, to take the names and addresses of any persons found therein, and to seize any books and papers relating to the business of the club."

(1) See note (1) ante, p. 474.

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the justices' satisfaction that the respondent, with the said forty-five other persons, had been served with intoxicating liquor and had paid for it. (3.) The appellant seized five glasses of beer, one of which had been paid for by the respondent and was being consumed by her. (4.) The appellant took or caused to be taken the names of the respondent and the said other forty-five persons. (5.) There were upon the premises at the time of the said entry by the appellant approximately 150 persons including the respondent and the said forty-five other persons. (6.) There was in the bar of the premises a considerable amount of unsold intoxicating liquor. (7.) When the appellant entered there was a large number of glasses of beer on the tables, but many of them belonged to members, guests of members or affiliated members.

On the part of the appellant it was contended:—

(1.) That the appellant was entitled to apply for and execute a search warrant under s. 82, sub-s. 1 (1), of the Act for the purpose of entering upon the premises, searching for, seizing and removing such intoxicating liquor as he had reasonable grounds to suppose was on the premises for the purpose of unlawful sale.

(2.) That any persons found on the premises for the purpose of dealing with intoxicating liquor by the constable who had so entered the premises were guilty of an offence under s. 82, sub-s. 3 (1), and that the seizure of intoxicating liquor was not a condition precedent to the commission of an offence under that sub-section.

(3.) That the seizure of five glasses of beer was a sufficient seizure to justify the presumption raised by s. 82, sub-s. 3 (1), that any person found at the time on the premises should be deemed to have been there for the purpose of illegally dealing in intoxicating liquor.

(4.) That under s. 82, sub-s. 3, the onus of distinguishing whether any person was upon the said premises for the purpose of illegally dealing in intoxicating liquor or not rested in the first instance upon the appellant, and that therefore

(1) See note (1) ante, p. 474.

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he was not bound to lay an information against all persons found upon the premises, but only against such persons as he considered were upon the premises for the said purpose.

The justices were of opinion (1.) that the first of the above contentions was correct. (2.) That before the respondent could be convicted a search for, seizure and removal of intoxicating liquor as set out in s. 82, sub-s. 1 (1), was a condition precedent, and in view of the fact that it was proved that at least forty-six persons, including the respondent, had been illegally dealing in intoxicating liquor, the seizure of five glasses of beer was not a sufficient seizure as contemplated by s. 82, sub-s. 3. (1) They were of opinion that the words in s. 82, sub-s. 1 (1), "any intoxicating liquor found therein which there is reasonable ground to suppose is in the place for the purpose of unlawful sale" meant "all" such liquor. (3.) That the appellant was entitled under s. 82, sub-s. 3, to take upon himself the responsibility of distinguishing between the persons who were on the premises legitimately and those there for the purpose of illegally dealing in intoxicating liquor. Therefore they held that the appellant had a discretion and that the words "until the contrary is proved" in s. 82, sub-s. 3 (1), meant "proved to the satisfaction of the constable making the raid," and that therefore the proceedings were not vitiated by the fact that the appellant had only taken the names of forty-six persons.

In view of their opinion set out in para. 2 the magistrates dismissed the information, but stated this case.

Denis H. Robson for the appellant. The justices were wrong. The seizure of five glasses of beer was sufficient to satisfy s. 82, sub-s. 3, which speaks of "liquor," not "the" liquor, so that it was not necessary to seize all the liquor intended for illegal sale. Otherwise if, say, a bottle of beer was hidden and not found, no charge could be sustained. But in any case it is not a condition precedent to persons on the premises being deemed to be there for the purpose of illegal dealing in intoxicating liquor, that liquor should be seized; otherwise, if such persons managed to consume their liquor before the

(1) See note (1) ante, p. 474.

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police could seize it, they would commit no offence. Nor is it a condition precedent that the liquor should be removed, for were it so any such person escaping from the premises before the removal could not successfully be proceeded against. If there is no seizure and removal it only means that the burden of proof is altered ; the prosecution must prove their case in the ordinary way, instead of the accused having to rebut the presumption of guilt. The respondent could have rebutted the presumption in this case, but did not do so. The question which it is desired to have settled is whether the police ought to have seized the liquor which was behind the bar. The decision of the justices involves the substitution of " all " for " any " in s. 82, sub-s. 1.

[AVORY J. How can the constable decide which of the bottles behind the bar are going to be sold legally, and which illegally ?]

If he is in doubt he should seize them all. Sect. 82 is not a new section, but has existed at least since 1874 : see s. 17 of the Licensing Act, 1874 (37 & 38 Vict. c. 49). It clearly in its literal terms is capable of application to clubs, and if, when in 1902 registered clubs came into existence under s. 24 of the Licensing Act, 1902 (2 Edw. 7, c. 28), the Legislature had intended that s. 82 should not apply, they could very easily have so enacted. Sect. 96 of the Act of 1910 was not intended to be a code applicable only to clubs ; it is supplementary to s. 82—e.g., it gives a power to seize books and papers of the club which does not exist under s. 82, and also confers additional powers on the police in the case of clubs.

Stephen Chapman for the respondent. Sect. 82 of the Act of 1910 enacts that when the constable has entered and seized liquor there is a presumption that persons in the club are there for the purpose of illegally dealing in intoxicating liquor, and it is admitted that consumption thereof is illegal dealing. " Any " in s. 82, sub-s. 1, means " all," therefore the seizure of five glasses only was not sufficient. It is submitted that s. 82 does not apply to clubs, and there is no case reported in which it has been so applied. The prosecution

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here was under s. 82 only because the seizure took place on a Sunday. It only applies to places which are not licensed but which, to justify the sale of liquor which has taken place therein, ought to be licensed, so that any liquor found therein intended for sale would necessarily be intended for illegal sale. Sect. 82 deals with places where liquor is "sold," i.e., places whose business is the sale of liquor. But in registered clubs that is not the business, but all that is done legitimately is to distribute amongst the members their own liquor. If the appellant is right the impossible task is imposed on a constable executing a search warrant under s. 82, sub-s. 1, of determining which part of the liquor found on the premises is intended for legal and which for illegal sale, a result which cannot have been contemplated by the Legislature.

Sects. 91 to 98 form a code dealing only with clubs, and any proceedings against a club must be taken under that code.

If s. 82 applies to clubs there would have been no necessity for s. 96.

Denis H. Robson replied.

LORD HEWART C.J. I desire to say that this case has been extremely well argued on both sides by Mr. Robson and by Mr. Chapman, and I should have no doubt at all upon the matter if it were not for the fact that in the course of the argument my brother Avory, with his unrivalled knowledge of licensing law, has at any rate suggested a possibility of doubt. Nevertheless, looking upon the whole matter, I have come to the conclusion that this appeal ought to be allowed, for the reason that, as I think, all of the contentions (1.), (2.), (3.) and (4.) on the part of the appellant set out in the case were in point of law correct. The difficulty which is suggested is that in some way or other s. 96 of the Licensing (Consolidation) Act, 1910, which deals expressly with search warrants, authorizing the entering of clubs, by implication excludes the provisions of s. 82 of that Act in the case of registered clubs. As a matter of history everybody knows that s. 82 of the Act of 1910 goes back at least to the year 1874, before the term "registered club" had come to exist—see s. 17

of the Licensing Act, 1874—and if the Legislature had intended in the Act of 1910, which is a consolidation Act, to exclude registered clubs from the operation of s. 82, a single phrase, either in s. 82 or in s. 96, would have accomplished that purpose. No such words are to be found in either section, and therefore the argument comes to be this, that in the case of registered clubs the particular provisions of s. 96 must by implication be taken to supersede and exclude the general but in some ways less harsh provisions of s. 82.

With the greatest respect to those who have raised or developed that crux, it does not appear to me that there is any difficulty in saying that s. 82 and s. 96 live side by side in this Act, and what s. 96 does is that in certain respects by no means unimportant, as, for example, the seizure of books and papers relating to the business of the club, it adds to the provisions already contained in s. 82. In the absence of clear words or at any rate a more clear implication that s. 96 has excluded the operation of s. 82 in the case of clubs, I am of the opinion, with diffidence based only upon the ground I have already mentioned, that s. 96 is within its areas and with its special purposes, superimposed upon s. 82.

I do not repeat the contentions of the appellant which were so clearly laid before the Court by Mr. Robson; they seem to me to be correct, and I think this appeal ought to be allowed, and that the case ought to go back to the justices with an expression of opinion that the offence which was charged was proved.

AVORY J. The only ground in this case upon which the justices have dismissed the information is to this effect: that before the respondent could be convicted under s. 82, sub-s. 3, a search, seizure and removal of intoxicating liquor as set out in sub-s. 1 was a condition precedent, and, in view of the fact that it was proved that at least forty-six persons, including the respondent, had been illegally dealing in intoxicating liquor, the seizure of five glasses of beer was not a sufficient seizure as contemplated by s. 82. Now in that view I think the justices were clearly wrong. They seem to have assumed that all the steps to be taken by the police officer are to proceed in a certain order: that he first of all is to examine the premises; then he is to search for intoxicating liquor; and then he is to seize and then he is to remove any intoxicating liquor found which there is reasonable ground to suppose is in the place for the purpose of unlawful sale; and that it is only after all those events have happened that he then is authorized to ascertain what persons are found on the premises; therefore, if necessary, to take their names; and that the persons so found after the other events have happened are to be deemed to have been on the premises for the purposes of illegally dealing.

I think that is quite a wrong construction of the section; that it contemplates persons who may be on the premises at the time when the officer arrives, and that it is no condition precedent to their being deemed to be there for the purpose of illegal dealing that he should have seized what the justices think is the proper amount of intoxicating liquor. They think in this case that because there were forty-six persons present, the seizure of five glasses of beer was not a sufficient seizure. Therefore I agree, assuming s. 82 applies to this case, that the justices ought to have found the offence proved against this particular respondent.

But I wish to express a doubt which has not been completely removed, although it has been modified, by the judgment which my Lord has delivered. I express a doubt whether s. 96 was not intended to be a complete code in itself of procedure in the case of a registered club, where it is obvious that intoxicating liquor may be the subject either of a lawful sale or of an unlawful sale. And I am influenced in expressing that doubt by the practical difficulty which arises in the case of a registered club when the officer is proceeding under s. 82, which empowers him to remove any intoxicating liquor which there is reasonable ground to suppose is in the place for the purpose of unlawful sale. In the case of a registered club it seems to me impracticable, if not impossible, for the police officer to determine by any inspection, which part of the liquor on the premises is intended for the purpose of unlawful sale and which part is intended for the purpose of lawful sale. That is the ground upon which I have expressed this doubt; but I appreciate that it is possible that s. 96 is meant to be supplementary to s. 82, and gives some additional powers to the officer in the case of a registered club which are not to be found in s. 82. I agree that the case ought to be sent back to the justices to find that the offence was proved.

SWIFT J. In this case I am in entire agreement with the judgment which was delivered by the Lord Chief Justice. The only difficulty that I have had during the hearing of the arguments has been the doubt which was suggested by my brother Avory; but I am quite satisfied that s. 82 is as applicable to registered clubs as it was to unregistered clubs between the years 1874 and 1902, when there were no such things as registered clubs. If there had been an illegal sale, as opposed to a distribution among the members themselves of their own alcoholic liquor, in the premises of a club before 1902, there can be no doubt that an offence would have been committed, proceedings for which might have been taken under s. 82; and when registered clubs were introduced by s. 24 of the Licensing Act, 1902 (2 Edw. 7, c. 28), extra provision had to be made for dealing with them. In addition to confirming the right of distributing intoxicating liquor, certain obligations were put upon them by the Act of 1902 (now the Licensing (Consolidation) Act, 1910) and certain grounds were specified upon which they could be removed from the register. They are to be found in s. 95; and, in order that s. 95 might be fully operated, s. 96 was added, giving additional powers to magistrates and the police —additional to what was given by s. 82 and applicable only to clubs. By s. 96 they obtain the power to issue a warrant where there is reasonable ground for supposing that any registered club is so managed or carried on as to constitute a ground for striking it off the register; that is, in cases where those carrying on the club have been doing something quite apart from illegally selling intoxicating liquor. The

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words in the section "or that any intoxicating liquor is sold or supplied, or kept for sale or supply," applies to unregistered clubs; but, quite apart from the illegal sale of intoxicating liquor, there may be grounds for striking a club off the register, and the search warrant which is granted under s. 96 authorized entry, inspection of the premises, the taking of names and addresses, and the seizure of any books and papers relating to the business of the club. If magistrates and police had to rely only upon s. 82, they would not be able to seize any books or papers. It seems to me that s. 96 was intended to give additional powers and not to detract from the powers of s. 82.

With regard to the difficulty which my brother Avory has suggested as to a police officer not being able to discriminate between that liquor which was intended for legitimate use and that which was intended for illegal sale, it seems to me there can be no difficulty. He may seize that about which he has no doubt. I do not think he is bound to seize all about which he has no doubt. He may certainly seize that about which he has no doubt, and if there is any that he is doubtful about, it seems to me that he solves his difficulty by seizing all that he finds upon the premises.

Having regard to the views which I have expressed, I adopt, if I may respectfully say so, the reasoning in the judgment of the Lord Chief Justice, and I agree that this case must be sent back for the purpose of conviction.

Appeal allowed.

Solicitors for appellant: *Gregory, Rowcliffe & Co., for Newlands, Newlands & Patterson, Jarrow.*

Solicitors for respondent: *King, Wigg & Brightman, for F. J. Lambert, Gateshead.*

W. L. L. B.

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Workmen's Compensation—Industrial disease—Miner's Nystagmus—Physical recovery—Mine-owners' refusal to employ men who have previously suffered from Miner's Nystagmus—Refusal not connected with injury—Incapacity not resulting from the injury—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 1; *s.* 43.

A miner who, after being disabled by miner's nystagmus, has become fit for work at the coal face, but is unable to obtain work there by reason of the refusal of mine-owners to employ a man below ground who has suffered from miner's nystagmus, is not entitled to recover compensation under the Workmen's Compensation Act, 1925, even though the attack of nystagmus has rendered him more susceptible to another attack, so that in that sense he has not completely recovered from his injury.

French v. *Archibald Russell, Ld.* (1934) 27 B. W. C. C. 338, must be treated as having overruled *Morton* v. *South Kirkby, etc., Collieries, Ld.* (1933) 26 B. W. C. C. 180, although the claim for compensation arose in the former case under s. 9, sub-s. 4 (i.), of the Act and in the latter case under s. 9, sub-s. 1. In a case where the incapacity for work is not to be treated as one of "the continuing effects of the injury" within s. 9, sub-s. 4 (i.), it cannot be treated as resulting from the injury within s. 9, sub-s. 1.

Appeal from the judge of the Doncaster County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

The applicant, John Thomas Andrews, was employed for many years by the Denaby and Cadeby Main Collieries, Ld., as a coal miner, but on March 16, 1926, he was certified to be suffering from miner's nystagmus and received compensation under the Workmen's Compensation Act, 1925. About a year later he returned to work at the coal face and worked there till July 28, 1930, when he was again certified to be suffering from miner's nystagmus and received compensation for total incapacity until November, 1930. Compensation was then reduced from 30*s.* to 15*s.* a week on the ground that the workman was fit for work on the surface. On December 19, 1930, Dr. Hargreaves certified that the workman was still suffering from miner's nystagmus, but in January, 1931, he found that the man was physically capable of work at the coal face. The workman then applied for employment underground, but the manager refused to take him on at that work and suggested that he was too old and that the nystagmus would return if he were employed below ground. This continued from January, 1931, when compensation ceased to be paid, until February 28, 1933, when the workman was once more employed at the face. He worked there till December, 1933, when the seam was shut down and 200 men (including the applicant) discharged.

The workman brought these proceedings claiming compensation for partial incapacity at the rate of 15*s*. a week from January, 1931, till March, 1933. He alleged that during this period he earned nothing and that, owing to the practice of mine-owners to refuse employment at the coal face to any man who could not sign a statement that he had never suffered from nystagmus, he could in no circumstances have earned more than half his old wages of 3*l*. a week.

The county court judge said that the claim for compensation in this case was based on two separate grounds: (1.) that work at the coal face was unsuitable in January, 1931, and (2.) that the applicant could not get employment owing to the policy of mine-owners in refusing employment to any one who could not sign a statement that he had never suffered from miner's nystagmus. He accepted, however, the evidence of Dr. Hargreaves that the workman was physically capable of working at the coal face in January, 1931, and he found, therefore, that work at the coal face was not then unsuitable work for him. That left only the question of the employers' ban and the application of what was known as the rule in *Ball* v. *Wm. Hunt & Sons, Ld.* (1); and in this connection he found that the workman had never fully recovered from his accident but continued to be thereby rendered more susceptible to another attack. The colliery owners, or the great majority of them, insisted on colliers signing a book stating whether they had ever suffered from nystagmus, and would not as a

(1) [1912] A. C. 496.

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rule employ any one who could not state that he had never suffered from that complaint. It was said for the employers that the mine-owners were merely guarding themselves against employing any man who was susceptible to the disease and were not concerned with the question whether the susceptibility was natural or increased by accident, and that it could not therefore be said that it was the accident rather than his natural susceptibility which had prevented the applicant from being employed. He could not accept this argument. The effect of the ban was to prevent the employment of men who could not say that they had never suffered from nystagmus as an incapacitating disease. It was only because the applicant had suffered this injury that he could not make the statement, and he found that it was his injury which had lessened his chance of employment by making it impossible for him to get work at the face. He therefore awarded compensation of 15*s.* a week from January, 1931, to March, 1933.

The employers appealed. The appeal was heard on October 24 and judgment given on November 16, 1934.

Edgar Dale for the appellants. Under s. 43, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1925, compensation is not to be payable on the recurrence of an industrial disease if the workman at the time of entering the employment wilfully and falsely presented himself in writing as not having previously suffered from the disease, and it is in reliance on this provision that a miner is called on to say whether he has previously suffered from nystagmus. Men who cannot say that they have not are not as a rule employed at the face. The county court judge has given the workman compensation in respect of this ban, but it was wrong to do so, as the inability to obtain employment was not due to any continuing physical effect of the injury. The belated application in this case was due to the decision of this Court in *Morton* v. *South Kirkby, etc., Collieries, Ld.* (1)

[ROMER L.J. Has the county court judge found that the workman had never recovered ?]

(1) 26 B. W. C. C. 180.

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For the purpose of applying the rule in *Ball* v. *Wm. Hunt & Sons, Ld.* (1), but his finding is ambiguous. Even assuming that he has found that the susceptibility to a recurrence of the disease was increased by the previous injury it is immaterial, because employment at the face was refused to the workman solely because he could not sign a statement that he had never suffered from nystagmus, and this result ensued whether or not the proneness to another attack of the disease was constitutional or due to the previous attack. In *Jones* v. *New Brynmally Colliery Co.* (2) the county court judge found that the employers' refusal to employ a man underground after an attack of nystagmus showed that it made the man more prone to the disease, but the Court of Appeal said it was impossible to tell whether this was so. There was no evidence of increased susceptibility as a result of the earlier attack; but even if there was, the further question would arise of why employment was refused. The employers were indifferent whether a man was constitutionally susceptible to the disease or suffered from increased susceptibility owing to the previous attack. *Connor* v. *Cadzow Coal Co.* (3); *Penrikyber Navigation Colliery Co.* v. *Edwards* (4); and *M'Dougall* v. *Summerlee Iron Co.* (5) have no bearing on this issue. The county court judge relied on *Morton* v. *South Kirkby, etc., Collieries, Ld.* (6), but in so far as that case decides that a workman is entitled to compensation by reason of the ban, when no increased susceptibility as the result of a previous attack is proved, it differs from the decision of the House of Lords in *French* v. *Archibald Russell, Ld.* (7), and must be treated as overruled.

John Neal for the respondent. The workman was refused work underground solely because of his inability to sign a statement that he had never suffered from nystagmus. That refusal of work was thus the result of the injury within s. 9, sub-s. 1, of the Act.

[SLESSER L.J. In *Crawford* v. *Merry & Cuninghame, Ld.* (8), it was held that the accident was merely the causa sine qua non and not the causa causans, but in *Morton's* case (1) this Court held that the accident was the causa causans.]

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(1) [1912] A. C. 496.
(2) (1912) 5 B. W. C. C. 375.
(3) [1932] A. C. 1.
(4) [1933] A. C. 28.
(5) (1927) 20 B. W. C. C. 419.
(6) 26 B. W. C. C. 180.
(7) 27 B. W. C. C. 338.
(8) (1930) 23 B. W. C. C. 575.

The decision in *Morton's* case (1) ought to be followed. *French* v. *Archibald Russell, Ld.* (2), is distinguishable, as it was dealing with s. 9, sub-s. 4, of the Act and not s. 9, sub-s. 1. *Morton's* case (1) was not there referred to. There would, however, still be a right to compensation even if the previous accident was merely the causa sine qua non: *Dunham* v. *Clare.* (3)

The principle of *Ball* v. *Wm. Hunt & Sons, Ld.* (4), applies here. The House of Lords cannot overrule a principle laid down by itself, and for this reason the application of *French's* case (2) must be strictly limited to cases under s. 9, sub-s. 4 (i.), of the Act. Again the county court judge was entitled here to treat the man as not fully recovered. He was not certified as having completely recovered, but as being fit for work at the coal face.

Edgar Dale replied.

Cur. adv. vult.

1934. Nov. 16. SLESSER L.J. In 1926, the workman in this case, a miner, was certified as suffering from miner's nystagmus. After twelve months he returned to the coal face and worked there until July 28, 1930, or thereabouts, when he obtained a second certificate of that industrial disease.

On this later certificate he received compensation on the basis of total incapacity of 30*s.* until November of that year, when it was reduced to 15*s.* On December 19, 1930, Dr. Hargreaves certified that the workman was suffering from nystagmus, and the learned county court judge says that he accepts the doctor's evidence as to his physical state in January, 1931, and finds that the workman was then physically capable of working at the coal face. He states that he had worked at the coal face in January, 1931, and from March to December, 1933, without being incapacitated.

(1) 26 B. W. C. C. 180.
(2) 27 B. W. C. C. 338.
(3) [1902] 2 K. B. 292.
(4) [1912] A. C. 496.

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On these findings, but for the matters which have here to be considered, it is clear that the workman would not be entitled to any compensation after January, 1931, by reason of the fact that he was then found to be physically capable of working at the coal face, and that work at the coal face was not unsuitable work for him at that date. But an important question has been raised in this case which the learned county court judge has answered in favour of the workman, and it calls for careful consideration.

The learned judge has found that the applicant, although physically competent to do his old work, had never completely recovered from his accident but continued to be thereby rendered more susceptible to another attack, and also that the colliery owners, or the great majority of them—including, I take it, the appellants in this case—insist on colliers signing a book stating whether they have ever suffered from miner's nystagmus, and will not, as a rule, employ any one who cannot make the statement that he has not. He has come to the conclusion that the effect of this ban is to prevent employment of men who cannot say they have never suffered from miner's nystagmus as an incapacitating disease, and that the only reason why the applicant cannot make this statement is that he has suffered the injury in respect of which he now claims, and he finds that it is this injury which has lessened his chance of employment by making it impossible for him to get work at the face. He accepts the workman's estimate that, being so partially incapacitated, he could have earned 15*s.* per week from January 10, 1931, to March 27, 1933, and gives him compensation on the basis of partial incapacity on that footing.

Were it not for a decision of the House of Lords, which was given after the decision of the learned county court judge in this case in *French* v. *Archibald Russell, Ld.* (1), I think that the workman would have been entitled to say that the conclusion of the learned county court judge could be supported by the decision of this Court in the case of *Morton* v. *South Kirkby, etc., Collieries, Ld.* (2) In that case it was admitted

(1) 27 B. W. C. C. 338.

(2) 26 B. W. C. C. 180.

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that the workman at the time of the request for arbitration was absolutely fit to go and do his old work at the coal face, but that his old employers refused to give it him on the ground that he might have a recurrence of nystagmus, and other collieries refused to give him work by reason of the policy of coal-owners in the district in refusing to employ miners who have suffered from nystagmus. The county court judge held that the applicant was entitled to compensation on the basis of total incapacity. This finding was held not to be conclusive as to work other than at collieries, but as regards work there by reason of the refusal of employers to accept men who had suffered from nystagmus, the award was upheld; it was pointed out in the words of Lord Hanworth, M.R. (1) that there was "no attribution of the disability to get work on the surface generally at these various places to his having had nystagmus." And, again: "It may well be that it was the condition of the labour market which shut the man out from getting work at garages, road jobs, council work . . . . and the like." But as to the critical question of partial incapacity to be attributed to the fact that he could not get work at the collieries as a miner at the face by reason of the employers' policy, it was held unanimously that there was evidence on which the county court could find that such disability was due to the refusal of the employers to employ men who suffered from nystagmus. I ventured to point out that our view was perhaps inconsistent with the view taken in Scotland in *Crawford's* case (2), where the Lord Justice-Clerk says (3): "The inability to find work . . . . is not in any reasonable sense due to the injury which he sustained while in the employment of the appellants. Nay, rather is it due to the attitude which certain mine-owners have thought fit to adopt with regard to the men whom they propose to employ."

Applying to the best of my ability the principle underlying the decision in *Ball* v. *Wm. Hunt & Sons, Ld.* (4), to the effect that "there is incapacity for work when a man has a physical

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(1) 26 B. W. C. C. 191.

(2) 23 B. W. C. C. 575.

(3) Ibid. 584.

(4) [1912] A. C. 496.

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defect which makes his labour unsaleable in any market reasonably accessible to him," per Lord Loreburn L.C. (1), I came to the conclusion (2) that as his inability to get work now in and about the coal face was due to the fact that the coal-owners have refused him work owing to his having contracted nystagmus, he was entitled to compensation, and similarly Romer L.J. said (3): "I agree that his incapacity to earn wages in the coal field has been shewn to be due to his injury none the less that the reason for the employers refusing to give him employment in that field was dictated by the facts deposed to by Mr. Herbert Smith" (of which evidence the learned county court judge had said that "In view of this evidence I have come to the conclusion and so find that if a workman has been compelled to give up working below ground in a colliery on account of nystagmus he has no chance of being again employed, either below ground or on the surface, by colliery owners in this part of Yorkshire, and that this state of things is due to the attitude which has been adopted by the indemnity company towards all men who have been unfortunate enough to contract nystagmus, ... he is entitled to compensation") and Romer L.J. continued: "The workman is in no way concerned with the reason that operates upon the mind of the employer when refusing him employment on account of his injury; he is only concerned with the fact that on account of that injury he has been refused employment."

The learned judge here founds himself upon *Morton's* case (4), and the problem to be considered is whether after the decision of the House of Lords in *French* v. *Archibald Russell, Ld.* (5), *Morton's* case (4) can any longer be considered to be good law. Now *Morton's* case (4) depended upon s. 9, sub-s. 1, of the 1925 Act, and it was there contended that the incapacity for work had resulted from the injury. As was pointed out in that case, owing to the date of the accident, which was before January, 1924, no question under s. 9,

(1) [1912] A. C. 499.
(2) 26 B. W. C. C. 192.
(3) Ibid. 194.
(4) 26 B. W. C. C. 180.
(5) 27 B. W. C. C. 338.

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sub-s. 4, of the 1925 Act could arise, and the case being one where there was actually physical recovery but a fear of recurrence of disease depended solely upon the *Ball* v. *Wm. Hunt & Sons, Ld.* (1), principle.

In *French's* case (2) the plaint made was that incapacity should be treated as total under s. 1, sub-s. 4, of the Act of 1931, that is s. 9, sub-s. 4, of the 1925 Act, as amended by the 1931 Act. In that section, sub-s. 4 (i) provides that the judge may order the workman's incapacity to be treated as total if, among other matters, the workman proves that it is probable that he would " but for the continuing effects of the injury " be able to obtain work in the same grade in the same class of employment as before the accident. There also it had been certified that the workman's condition was such that he was fit for his usual work as a miner, and there also it was proved that no coal master in Scotland would give employment underground to any one who was unable to sign a declaration to the effect that he had not previously suffered from miner's nystagmus.

The Court of Session (Lord Morison dissenting) held that the appellant's failure to obtain employment was due to the fact that he could not make the declaration as to his not having suffered from nystagmus, but that such failure was not due to the continuing effects of the injury, nor was it a consequence wholly or mainly of the employment. As to the second of these findings, which is the alternative provision which may justify a judge in finding notional total incapacity under sub-s. 4, Lord Tomlin in the House of Lords says that the appellant owner sought to bring himself within it, and that the arbitrator had not dealt with the case under that head. Their Lordships dealt with the case entirely under s. 9, sub-s. 4 (i.). Lord Tomlin points out that as the workman did not suggest that he could not obtain employment other than employment underground in the collieries, the arbitrator had no evidence upon which he could find that the appellant had failed to obtain employment generally as a consequence wholly or mainly of the injury. Had he so found, as did the

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(1) [1912] A. C. 496.

(2) 27 B. W. C. C. 338.

Court of Session, under s. 9, sub-s. 4 (ii.), it would have been clear that their Lordships' decision was directly contrary to *Morton's* case (1), because the language " consequence wholly or mainly of the injury " is almost identical with the language of sub-s. 1 of s. 9 " where total or partial incapacity for work results from the injury."

But a distinction is sought to be made between the words " the continuing effects of the injury " on which their Lordships passed and the words " results from the injury " in s. 9, sub-s. 1. It is true that Lord Tomlin does appear to have come to the conclusion that the words " the continuing effects of the injury " could not properly be used in a case where the incapacity to get work was not the result of a physical condition, and he cites the case of *Barstow* v. *Ingham's Thornhill Collieries, Ld.* (2), as authority for saying that the words " continuous effect of the injury " refer to the physical condition of the workman only. And, of course, it is clear that an inability to sign a declaration is not a continuous physical effect of the injury. And I think to that limited extent it is perhaps true to say for that reason, based upon the physical effects of the injury, as their Lordships refused to found upon s. 9, sub-s. 4 (ii.), that *French's* case (3) is not a direct decision upon the point which we have here to consider. Nevertheless, I have come to the conclusion that by necessary implication it must apply. Once the conclusion is reached that the language of s. 9, sub-s. 4 (ii.), is similar in the effect of its terms for the purposes of this case to s. 9, sub-s. 1, which is the sub-section to be considered in this case, it would produce the result that a workman proceeding under s. 9, sub-s. 4 (i.), would fail to be able to rely upon the fact that employers in a particular industry would not employ him by reason of their policy as to nystagmus, but could invoke s. 9, sub-s. 4 (ii.), in appropriate cases where his failure to obtain employment was due to the fact that employers would not engage him because they would not employ any one who had suffered the particular industrial

(1) 26 B. W. C. C. 180.
(2) [1934] A. C. 304.
(3) 27 B. W. C. C. 338.

disease, the disablement from which produced the particular accident.

Therefore, as I say, although the language of Lord Tomlin in terms speaks of the necessity to show a physical effect of the injury and considers that the fact that it is not the contraction of the disease simpliciter, but the contraction of the disease plus the consequent disablement which is the injury by accident, yet, nevertheless, I cannot but think that the decision of the House of Lords, regarded generally, makes it impossible any longer to regard *Morton's* case (1) as good law, because the refusal of the employers in that case and the present case is not necessarily due to a physical defect, but is applied to all cases where there has been nystagmus whether it is physically present at the time of application for work or not.

I do not think it necessary now to discuss the decision of the Court of Appeal in the case of *Jones* v. *New Brynmally Colliery Co., Ld.* (2), because, as I have stated, whatever difficulty there may be in reconciling certain observations of Moulton L.J. with the judgment of this Court in *Morton's* case (1), the House of Lords have now definitively decided the question.

It follows, therefore, that the learned judge was wrong in holding himself to be bound by *Morton's* case (1) and that this appeal succeeds.

ROMER L.J. The facts of this case have already been stated by Slesser L.J., and it is unnecessary to repeat them. The important thing to bear in mind is that, although by reason of the attack of nystagmus the workman has been found to have been rendered more susceptible to that disease, and has not, therefore, completely recovered from the attack, nevertheless the county court judge has not found, nor on the evidence could he have properly found, that the workman's inability to find employment is due to that increased susceptibility to the disease. It is due to the fact that he has had nystagmus in the past and not to the fact that he has never

(1) 26 B. W. C. C. 180.

(2) 5 B. W. C. C. 375.

completely recovered from the attack. In these circumstances the question to be determined on this appeal is whether the workman's incapacity to find work in a mine, that is to say, his partial incapacity for work, results from the personal injury that by virtue of s. 43 of the Workmen's Compensation Act, 1925, he is to be deemed to have suffered.

In order to determine this question, it is necessary to consider one or two authorities, and the first case to which I desire to refer is that of *Jones* v. *New Brynmally Colliery Co., Ld.* (1) In that case a collier had been certified as suffering from nystagmus and thereby disabled from earning full wages. He received compensation until he was in a fit condition to resume work underground, when such compensation was stopped. The employers, however, refused to continue the man's employment as a collier on the ground that as he was subject to nystagmus the disease would probably recur if he resumed work under the surface. The workman thereupon applied to have the compensation continued. The county court judge found that the workman had completely recovered "in a sense," but that the disease would probably recur. There was not, however, any evidence that the attack of the disease had rendered him more susceptible to nystagmus than he was before the attack. In these circumstances the Court of Appeal set aside an award in the workman's favour, inasmuch as there was no evidence upon which it could be found that the workman had not completely recovered. In the course of his judgment, however, Moulton L.J. said: "If the fact that he has had nystagmus is a warning, and that is why colliery owners will not send him down, they are under no liability in respect of that, but if the fact that he has had nystagmus leaves behind it an increased susceptibility to nystagmus due to the previous attack, and it is because of that they will not send him down, then the effect of the accident has not ceased and his loss of underground work is due to a consequence of the accident, and in that case they would be liable and he would be entitled to compensation."

From this decision it would appear (1.) that, if a workman

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(1) 5 B. W. C. C. 375.

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has completely recovered from an attack of nystagmus, he cannot obtain compensation even though he fails to get employment because employers will not take a man on who has once had nystagmus; (2.) if, on the other hand, he has not completely recovered from the attack of nystagmus in the sense that the attack has rendered him more susceptible to a renewal of the disease, and employers refuse to give him employment because of that increased susceptibility, he will be entitled to compensation. His failure to obtain employment, that is to say, his "incapacity for work," as those words have been construed by the Court, results from his injury. The former of these two propositions was actually decided, in the case. The latter was not necessary for the decision, and the observations of Moulton L.J. must be taken to be merely obiter. The question whether the workman could recover compensation in the latter case, if employers refused to employ him not because of his increased susceptibility, but merely because he has had nystagmus, was not decided.

The next case to which I desire to refer is that of *Crawford* v. *Merry & Cuninghame, Ld.* (1), a decision of the Court of Session. The workman there who had been incapacitated was certified by a medical referee to have completely recovered and to be fit for his ordinary work. He was, however, unable to obtain employment owing to an agreement amongst mine-owners to refuse to employ miners underground who had previously suffered from nystagmus, and he sought to obtain an award of compensation under s. 9, sub-s. 4, of the Act of 1925. It was held that the sub-section did not apply to cases in which the workman had completely recovered from his injury. But Lord Alness, and apparently Lord Anderson, held further that even if he had not recovered completely, his failure to obtain employment was not a consequence wholly or mainly of his injury. "No doubt," said Lord Alness, "his attack of nystagmus is a causa sine qua non of his inability now to obtain work; but in my judgment it is not the causa causans. That must be sought for and found in the policy which mine-owners have recently adopted with reference to the victims of nystagmus." The question left undecided in *Jones* v. *New Brynmally Colliery Co.*, (1) should therefore, according to the dicta of Lords Alness and Anderson, be decided in favour of the employer. For although the earlier of these two cases was decided under the Act of 1906, Sch. I., para. 1 (*b*), and the latter under s. 9, sub-s. 4, of the Act of 1925, this would seem for the present purpose to be immaterial.

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(1) 23 B. W. C. C. 575.

I must now turn to the decision of this Court in *Morton* v. *South Kirkby, etc., Collieries, Ld.* (2) The workman in that case had not completely recovered from an attack of nystagmus in the sense that the attack had increased his susceptibility to the disease. He was quite fit for work at the coal face, but failed to obtain employment underground by reason of the policy of the coal-owners in refusing to employ miners who had suffered from nystagmus. He had also tried to get employment at places other than collieries. There was no evidence, however, to show why he had failed to get such other employment. The county court judge nevertheless awarded him compensation on the basis of total incapacity. On appeal to this Court the case was remitted for a new trial on the question whether the workman's failure to obtain employment at places other than collieries was attributable to the nystagmus. But that his incapacity to earn wages at collieries resulted from his injury within the meaning of Sch. I., para. 1 (*b*), of the Act of 1906 was not doubted by any member of the Court, though Slesser L.J. was the only one that dealt with the matter fully. He in terms expressed his dissent from the dicta of Lord Alness and Lord Anderson to which I have referred, holding that such dicta were inconsistent with the principle laid down in *Ball* v. *Wm. Hunt & Sons, Ld.* (3)

Thus the matter stood until the decision of *French* v. *Archibald Russell, Ld.* (4) That was the case of a workman who having been disabled by miner's nystagmus had become fit for work at the coal face, but had not completely recovered from his injury in the sense that he had by virtue of an attack of nystagmus been rendered more susceptible to another attack. He made repeated efforts to obtain employment, but failed to do so, because no coal master in his district would give employment to any workman who was unable to sign a declaration to the effect that he had not previously suffered from miner's nystagmus. In these circumstances an arbitrator found that it was probable that the workman would but for the continuing effects of the disease have been able to obtain work in the same grade in the same class of employment as before his disablement, and awarded him compensation on the basis of total incapacity under s. 9, sub-s. 4, of the Act of 1925 as amended by s. 1 of the Act of 1931. It was held in the House of Lords, affirming the decision of the First Division of the Court of Session, that the arbitrator was wrong in making an award of compensation as the words "the continuing effect of the injury" in s. 9, sub-s. 4 (i.), of the Act of 1925 as amended by the Act of 1931 refer to the physical condition of the workman resulting from the injury. In view of this decision, the case of *Morton* v. *South Kirkby Collieries* (1) must in my opinion be taken to be overruled. It is true that the House of Lords only dealt in terms with sub-s. 4 (i.) of s. 9. But if the words "continuing effects of the injury" refer only to the physical condition of the workman resulting from the injury, so too by parity of reasoning must the words "a consequence wholly or mainly of the injury" in sub-s. 4 (ii.). I cannot myself see any real distinction for this purpose between "continuing effects" and "consequence." If the failure to obtain work, that is, the incapacity for work, which is due to what has been called the ban imposed by employers on men who have had nystagmus, is not to be treated as a continuing effect of the injury or a consequence of the injury for the purpose of s. 9, sub-s. 4, it is not, as it seems to me, open to this Court to hold that it can nevertheless be treated as resulting from the injury for the purpose of s. 9, sub-s. 1.

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(1) 5 B. W. C. C. 375.
(2) 26 B. W. C. C. 180.
(3) [1912] A. C. 496.
(4) 27 B. W. C. C. 338.

In my opinion this appeal must be allowed.

Appeal allowed.

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(1) 26 B. W. C. C. 180.

Solicitors: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham; Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

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KNEEN (INSPECTOR OF TAXES) *v.* MARTIN.

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Revenue—Income Tax—Possessions out of the United Kingdom—Proceeds of sale of investments in America remitted to United Kingdom—"Actual sums annually received in United Kingdom from remittances payable in United Kingdom"—"Sums" confined to "sums of income"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., r.* 2.

The respondent, a widow, was a citizen of the United States of America, but had in 1925 purchased a house in this country in which she had since resided. She was possessed of certain American securities, stocks and shares, which she had deposited for safe custody at a bank in New York. In the years 1932 and 1933 she caused certain of these securities, stocks and shares to be sold in America and the proceeds remitted to her in this country. Estimated assessments to income tax were made upon her for 5000*l.* for each of the two years 1932 and 1933 under r. 2 of Case V. of Sch. D of the Income Tax Act, 1918. On appeal by the respondent the Special Commissioners found that the proper inference to be drawn from the facts of the case was that the actual sums remitted to the respondent were all derived from the proceeds of the realization of investments owned by her before 1925 and not from income, or the proceeds of the realization of investments acquired out of income arising since that date, and that she was not resident in the United Kingdom before 1925. They accordingly discharged the assessments. On appeal by the Crown it was contended that under r. 2 of Case V. of Sch. D, the measure of liability to income tax in respect of income arising from possessions out of the United Kingdom was the full amount of the actual sums received in the United Kingdom. Finlay J. affirmed the finding of the Special Commissioners. On appeal:—

Held (affirming the decision of Finlay J.), that the opening words of Sch. D and of Cases IV. and V. of that Schedule showed that the purpose of r. 2 of Case V. was to deal only with the income which accrued from possessions out of the United Kingdom to the person to be charged and which was remitted to this country. Rule 2 was part of the machinery for carrying out that purpose, and must be read as if the words "of income" were inserted after the word "sums" in that rule.

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APPEAL from a decision of Finlay J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on March 15, May 19, and July 26, 1933, for the purpose of hearing appeals, Mrs. Gladys Robinson Martin, hereinafter called the respondent, appealed against the estimated assessments to income tax in the sum of 5000*l.* for each of the years ending respectively April 5, 1932, and April 5, 1933, made upon her by the Additional Commissioners of Income Tax for the Godley Division of the County of Surrey under the provisions of the Income Tax Acts in respect of remittances from abroad. Owing to her condition of health the respondent was unable to attend the hearings of the appeals and give evidence personally. In these circumstances the following statement of facts (embodied in paras. 2–13 inclusive of the case stated) was agreed between the parties.

2. The respondent was a citizen of the United States of America where she was born. She married in 1903 or 1904 James Edward Martin who died before 1910. He was an American citizen also, and throughout his life was domiciled in America. The respondent held an American passport.

3. During the years ending April 5, 1932, and April 5, 1933, the respondent was resident in the United Kingdom. She purchased a house at Sunningdale, in which she had since lived, in 1925.

4. The respondent possessed, during the said two years, securities, stocks and shares in a place out of the United Kingdom, namely, in America. The bonds, stock and share certificates, etc. were deposited for safe custody in New York with the Bankers Trust Company of New York.

5. The respondent had two separate bank accounts in New York with the aforesaid company. Into one account was paid on the instructions of the respondent such income as arose to the respondent in America. This account was called and was referred to in the case stated as the " Income " account. No such income was ever credited to the other account, which was in the case referred to as the " Capital " account. The

respondent also had a banking account in the United Kingdom with the Guaranty Trust Company of New York, Pall Mall, London.

6. During the year ended April 5, 1931, the respondent caused the following securities to be sold in America, and the proceeds of such sales to be sent to the United Kingdom :—

Item.	Date of Sale.	Securities Sold.	Proceeds.	Length of time Securities held prior to Sale.	
				Years.	Months.
1	May 7, 1930	$12,000 Brooklyn United Railroad 5% Bonds, 1950.	$10,405.00	16	5
2	Aug. 1, 1930	$5,000 Wabash Railroad 5% Bonds, 1976.	5,006.25	2	2
3	Oct. 2, 1930	$10,000 Federal Land Bank of Houston 4¾ % Bonds, 1954.	9,950.00	6	8
4	Dec. 26, 1930	$5,000 Standard Gas and Electric 6% Bonds, 1935.	4,968.75	13	8
5	Do.	$1,000 New York Railroad Corporation 6% Bonds, 1965.	477.50	4	8

The above sales were carried out, and the proceeds sent to England in the following manner :—

ITEM 1.—The bonds were delivered by the Bankers Trust Company (New York Office) to Messrs. Barstow & Co., stockbrokers in New York, by whom they were sold. The proceeds of the bonds, namely, $10,405, were remitted by the said stockbrokers to the Bankers Trust Company (New York office) where they were credited to the respondent's "Capital" account. $9405 of these proceeds were at once remitted out of the said "Capital" account to the Guaranty Trust Company (New York office) where the respondent had no account, and by that company were immediately remitted to the London office of the Guaranty Trust Company and there placed to the credit of the respondent's account. The remaining $1000 was shortly afterwards remitted to the respondent in Paris.

ITEMS 2 TO 5 INCLUSIVE.—The bonds were delivered by the Bankers Trust Company (New York office) to the said Messrs. Barstow & Co., who sold the bonds and caused the proceeds thereof to be remitted forthwith from their own account at the Chase National Bank in New York to the

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credit of the respondent's account at the London office of the Guaranty Trust Company.

7. During the year ended April 5, 1932, the respondent caused the following securities and shares to be sold in America and the proceeds of such sales to be sent to the United Kingdom.

Item.	Date of Sale.	Securities and Shares Sold.	Proceeds.	Length of time Securities held prior to Sale.	
				Years.	Months.
6	Oct. 30, 1931	$25,000 U.S. Liberty 4¾	$25,593.75	2	—
7	Nov. 7, 1931	200 shares Gillette Safety Razor Co.	3,142.00	3	10
8	Do.	10 shares ditto	155.85	3	10
9	Do.	200 shares Anaconda Copper Mining Co.	3,571.00	2	2
10	Nov. 17, 1931	500 shares Chicago Milwaukee St. Paul and Pacific Railroad.	1,442.50	2	2
11	Do.	10 shares Gillette Safety Razor Co.	143.35	3	10
12	Do.	600 shares Tobacco Prod. Corpn., Class A. .. .. .. 1,100 ditto, class A. .. 185 ditto	15,507.60	4	—
13	Dec. 2, 1931	$1,000 International Paper Co. 6% Bonds, 1955.	393.75	3	—
14	—	$19,000 ditto	7,451.25	3	—

These securities and shares were sold and the proceeds dealt with in the same manner as in the case of items 2–5 of para. 6 above, except that, in the case of items 10–14 inclusive, a different firm of brokers was employed, namely, Messrs J. R. Williston & Co., New York.

8. The proceeds of sale referred to in paras. 6 and 7 above were, when received in the United Kingdom, used by the respondent for living expenses. Of the amount so received during the year ending April 5, 1932, 4500*l*. sterling was used by the respondent to repay an overdraft upon her banking account in the United Kingdom. As security for such overdraft the respondent caused certain securities to be deposited with the New York office of the Guaranty Trust Company.

9. During the years ending April 5, 1931, and April 5, 1932, the interest and dividends arising from the respondent's securities, stocks and shares in America (including such interest

and dividends as arose before sale on the securities and shares specified in paras. 6 and 7) were banked in a separate bank account as set out in para. 5 of the case. The respondent either spent or applied in America the funds in this account, or investments were made in America in accordance with instructions given by the respondent, the cost being debited to this account. The respondent purposely caused the said interest and dividends to be paid into a separate bank account and the funds in this account to be spent, applied, or invested in America and not sent to the United Kingdom in order to avoid liability to United Kingdom income tax, which tax would have been in addition to income tax already borne in America. Such double taxation would, in the respondent's view, have made it impossible for her to reside in England.

10. The securities and shares sold as recited in paras. 6 and 7 above were neither in whole nor in part replaced by investment in the same securities or shares of the interest and dividends referred to in para. 9 above.

11. During the year ending April 5, 1931, the interest and dividends arising from the respondent's securities, stocks and shares in America were, in amount, more than the proceeds of sale of the securities referred to in para. 6 above.

12. During the year ending April 5, 1932, the interest and dividends arising from the respondent's securities, stocks and shares in America were, in amount, less than the proceeds of sale of the securities and shares referred to in para. 7 above.

13. The assessments under appeal were made on the footing that the respondent had income arising in the United States and that she was assessable in respect thereof on the basis of the remittances set out in paras. 6 and 7 above.

14. At the first hearing on March 15, 1933, Mr. Mellows, of the London office of the Bankers Trust Company of New York, attended and gave evidence on behalf of the respondent. He stated that he had looked after Mrs. Martin's affairs since 1926 and he produced a statement (attached to the case marked A) purporting to show the origin of the investments which had been sold and the proceeds whereof had been remitted as set out in paras. 6 and 7 above.

15. The Commissioners adjourned the proceedings on March 15, 1933, in order to give the respondent an opportunity if so desired of producing additional evidence that the remittances were remittances of capital.

16. At a subsequent hearing on July 26, 1933, Mr. Mellows again attended and gave further evidence. He stated that the New York office of his company periodically sent copies of the respondent's bank accounts there to the London office for transmission to her, and these had passed through his hands since the end of 1926. He had traced the history of the investments which had been sold and the proceeds remitted to the United Kingdom in the two years under review, and he produced a schedule attached to the case marked B. He had ascertained that some of the investments had been held by the respondent prior to 1925—in some cases as far back as 1914. One investment had been received by her upon a distribution of liquid assets of a company whose bonds she had first held in 1914. The remaining investments had been purchased out of her Capital account at or about the same times as investments of greater value had been sold, which latter investments she had acquired between 1910 and 1916. Other investments had been sold in America, and the proceeds paid into the Capital account, but Mr. Mellows had not traced their history. He did not know the amount of the income arising to the respondent in America since 1925; or the sources of her income, whether her expenditure had exceeded her income, or to what extent her income in America had been invested, nor could he say whether any investments acquired out of income arising since 1925 had been sold, but he felt justified in stating that none of the investments referred to in paras. 6 and 7 of the case had been purchased out of income arising since 1925, the reason being that at the time of the purchase of such of them as had been acquired since 1925 there had always been more than sufficient money available in the Capital account attributable to the sale of investments held before 1925.

The only facts before the Commissioners relative to the respondent's income were that for the years 1930–31 and

1931–32 (the basis years), the income in the first of such years exceeded the remittances and in the second year was less than the remittances.

17. It was not admitted on behalf of the Crown that the respondent had not been resident in the United Kingdom prior to 1925. There were no facts to show whether or not there were any grounds for regarding her as so resident except that she had no fixed place of residence here and had not made any income tax return or been assessed to income tax until that year.

18. It was contended on behalf of the respondent :—

(*a*) That the respondent had not received in the United Kingdom any income arising from securities or possessions out of the United Kingdom.

(*b*) That the sums received by her from America were remittances of capital, and were not assessable to income tax.

(*c*) That the remittances received by the respondent were identified as proceeds of realization of capital assets owned by her before she became resident in the United Kingdom.

(*d*) That the existence of income arising to the respondent from securities and possessions in America was not sufficient to establish liability to income tax in respect of such remittances under Rules of Case IV. and Case V. of Sch. D or otherwise.

(*e*) That if the Crown's contention were correct then in the case of a sale of a source of foreign income, s. 30 of the Finance Act, 1926, would operate in cases like the respondent's so as to tax the proceeds of sale of the source itself ; whereas it was clear from the terms of that section that income from the source alone was chargeable.

(*f*) That the assessments ought to be discharged.

19. It was contended on behalf of the Crown :—

(*a*) That under r. 2 of Case V. of Sch. D, the measure of liability to income tax in respect of the income arising from possessions out of the United Kingdom was the full amount of the actual sums received in the United Kingdom.

(*b*) That to the extent to which a person residing in the United Kingdom had income from possessions (including securities) out of the United Kingdom, that person was

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assessable to income tax on all remittances received in the United Kingdom from such possessions.

(*c*) That at least it must be presumed that the current charges were primarily met out of income, and if it were necessary to distinguish between remittances out of capital and remittances out of income, all sums expended as income must be deemed to be remittances out of income so far as there was income available, and must be included in assessment accordingly.

(*d*) That none of the sums was remitted for or used in respect of any transaction on " Capital " account in the United Kingdom.

(*e*) That in any event the burden of proof that sums received from possessions abroad were remittances out of capital must rest upon the person assessed, and in the present case the evidence showed that the remittances were remittances out of income.

(*f*) That the evidence put forward on behalf of the respondent was irrelevant as it merely showed the method adopted by her in procuring funds to remit to the United Kingdom.

(*g*) That the respondent had failed to establish that investments sold had not been replaced by investments purchased out of her " Income " account.

(*h*) That the Crown's contention as applied to the income as a whole applied equally to any particular source of income thus enabling s. 30 of the Finance Act, 1926, to be applied to the income from that source.

(*i*) That the assessments ought to be confirmed in principle, subject to adjustment of figures by reference to the amount of the remittances and of the income arising to the respondent in America and available for remittance.

20. The Commissioners gave their decision in the following terms: " We, the Commissioners who heard the appeal, were unable to accept the argument put forward on behalf of the Crown that where there is income arising to a person residing in the United Kingdom from possessions out of the United Kingdom, r. 2 of Case V. of Sch. D is sufficient to bring into computation for assessment to income tax all

remittances received. We considered that in the absence of evidence to the contrary there is a presumption that to the extent to which there is income arising in any country remittances received from that country are income and come within the charge to tax, but that such presumption may be rebutted. In the present case we were of opinion that, although the evidence was not conclusive, the proper inferences for us to draw were that the actual sums remitted to the respondent were all derived from the proceeds of the realisation of investments owned by her before 1925 and not from income, or the proceeds of realisation of investments acquired out of income, arising since that date, and that she was not resident in the United Kingdom before 1925. We also thought that it was a reasonable inference that the investments sold had been largely replaced by other investments acquired out of income arising in America. We were in doubt whether we ought not to hold that, to the extent to which there was income available in America for remittance and the sums remitted were used for expenditure as income, the amounts received in the United Kingdom must be regarded as being in substance remittances of income, and chargeable to income tax as such, but after considering the terms of the charging section and the Rules of Cases IV. and V. of Sch. D, the decision in the case of *Scottish Provident Institution* v. *Allan* (1) and s. 30 of the Finance Act, 1926, we did not feel that we should be justified in law in taking that view, and we discharged the assessments."

FINLAY J. affirmed the decision of the Commissioners.

The Crown appealed. The appeal was heard on November 26, 1934.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the appellant.

A. M. Latter K.C. and *T. N. Donovan* for the respondent were not called upon.

LORD HANWORTH M.R. This decision must be affirmed. It raises an interesting point as to the construction which is to

(1) [1903] A. C. 129; 4 Tax Cas. 409, 591.

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be placed upon r. 2 of the Rules applicable to Case V. The facts are that there is a lady who is now resident in this country and has been resident in this country for a number of years. She bought a property at Sunningdale, where she resides. She appealed against an assessment to income tax in respect of a sum of 5000*l.* for each of the financial years ending in April, 1932, and in 1933. That assessment was made upon her in respect of remittances from abroad. It appears that she was the widow of a citizen of the United States who, throughout his life, was domiciled in America. This lady is over here holding an American passport, and she is resident here but her domicile is American. Persons who are resident here are subjected to income tax, and in respect of the property the fruit of which they enjoy over here there are methods laid down in the Income Tax Acts for determining how the measure of their liability is to be ascertained. I turn to Sch. D, which is the Schedule applicable to the case of profits and gains which are derived from property abroad. Tax under the Schedule is to be charged in respect of " (*a*) the annual profits or gains arising or accruing—(i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere." That is the broad proposition. Sub-r. 2 provides: " Tax under this Schedule shall be charged under the following cases," and there are two Cases which are applicable to a person who receives profits or gains from property not situate in the United Kingdom. Case IV. imposes the tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Sch. C—with which we need not trouble—and Case V. imposes the tax " in respect of income arising from possessions out of the United Kingdom." Stopping there for a moment, it will be observed that Case IV. deals with securities and Case V. deals with possessions which, as has been pointed out in many cases—and in particular in *Colquhoun* v. *Brooks* (1)—is a wide word sweeping in all sorts of forms of possession.

Now we turn to consider the rules applicable to those two

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(1) (1889) 14 App. Cas. 493.

Cases, Case IV. and Case V. Rule 1 of Case IV. says that: " The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not." But there is a second rule to that Case IV. which says: " The foregoing rule shall not apply—(*a*) to any person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom," and that: " The tax in any such case shall be computed on the full amount, so far as the same can be computed, of the sums which have been, or will be, received in the United Kingdom in the year of assessment without any deduction or abatement." Now I turn to Case V. Case V. is split up into two portions by the rules. Rule 1 deals with income arising from stocks, shares or rents; r. 2 deals with tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, and it provides that the tax " shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom," and reading the later portion of r. 3, r. 1 is not to apply to a person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom, " and in such cases the computation shall be made in accordance with rule 2." So that there are plain and explicit words which require the computation in a case like the present to be made under r. 2. We are told in paras. 6 and 7 of the Case stated that this lady sold certain stocks and securities; some of them she had held for a very long time, some of them for a shorter time, and some of them had apparently been purchased out of accumulations of income; but in respect of all of them, what the Commissioners find is that they were sold and the proceeds were paid into a capital account which was one of the two accounts she had in America, and they were remitted over here to her as being the result of the sales on capital account of certain bonds and securities. The Commissioners say: " The proper inferences for us to draw were that the actual sums remitted to the respondent were all derived from the proceeds of realisation of investments owned by her before 1925 and not from income, or the proceeds of realisation of investments acquired out of income, arising since that date, and that she was not resident in the United Kingdom before 1925."

The original contention on the part of the Crown was this, that under r. 2 of Case V. of Sch. D the measure of liability to income tax in respect of income arising from possessions out of the United Kingdom is the full amount of the actual sums received in the United Kingdom. In other words, they say that r. 2 enables you to charge to tax the full amount of these sums received from a capital source but remitted to and received in this country, and that you need not inquire whether this is income; it is money received in this country, and, inasmuch as it has been received in this country, it is the full amount on which the tax is to be computed. The Attorney-General does not now put forward that contention, which has been negatived by the Commissioners. What he does say is that, inasmuch as there was money in this case received in this country, the assessments ought to be confirmed in principle, but that there ought to be an adjustment of figures by reference to the amount of the remittances and of the income arising to the respondent in America and available for remittance; in other words, he rejects the suggestion that the full amount received is to be deemed to be income and chargeable to tax, but, inasmuch as there has been this remittance of these sums, you are to go back and inquire what was the income that arose to the respondent in America and would have been available for remittance if the capital sums had not been remitted to her and satisfied her desire for available assets. In short, therefore, we have to construe r. 2 of Case V. The Attorney-General says that if you look at the latter part of the rule you will find that it can be read and ought to be read in this way: The tax in respect of income arising from possessions out of the United Kingdom shall be computed on the full amount of the actual sums received from remittances payable in the United Kingdom, from property imported, from money or value arising from property not imported, from money or value so received on credit or on account in respect of such remittances, from property, money or value, brought or to be brought into the United Kingdom, quite irrespective of whether those sums remitted, whether in kind or in specie or in negotiable instruments, are moneys which are income or capital. Accepting the view that there has been a remittance of capital, yet he says this rule enables you to hold as chargeable to tax the income which is to be ascertained in the United States, and in respect of which, so to speak, this sum over here is to be held by way of pledge; it is not to be, all of it, subjected to tax, but a less sum than it is to be held to tax if the taxpayer shows that the income which accrued to her in the United States is smaller than the amount remitted as it was; in other words, the Attorney-General does not limit this rule as one covering the income arising from possessions. He says it not only covers income but it also covers capital sums because of the later words in the rule. I cannot accept that view. We have been told, in cases to which I have referred, that the income tax is imposed upon income and not upon capital; those are the words of Lord Macnaghten in the well known case of *London County Council* v. *Attorney-General.* (1) We are told, also, in the old case of *Colquhoun* v. *Brooks* (2) that, although there may be wide words which may be sufficient, as they would have been sufficient in that case to cover the claim that was made by the Crown, you must put some limitation which accords with the purpose for which the Act is passed and the tax which it was designed to charge. I think that the opening words clearly indicate that the purpose of the rule is to deal with income. I think if you bear in mind the words I have read at the opening part of Sch. D and of the two Cases, and you consider that this rule is a part of the machinery for carrying out that purpose, it must be plain from the opening words and from the purpose of the rule that it has not the wide interpretation attributed to it by the Attorney-General, but that it is dealing throughout with the income which accrues from the possessions to the

(1) [1901] A. C. 26, 35.

(2) 14 App. Cas. 493.

person who is charged. Let me read the words once more: "The tax in respect of income arising from possessions out of the United Kingdom . . . . shall be computed on the full amount of the actual sums"—we must put in the words, to my mind, "of income"—"annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported," and so on. The Attorney-General asks us to construe the rule by a different measure, but he also requires some words to be put in, because he does not suggest that the full sum is to be taxed without any other consideration, but that there is to be a further inquiry, namely, by reference to the amount of the remittances and of the income arising to the respondent available for remittance.

I cannot introduce those words, nor can I assume that r. 2 has that purpose or effect. To my mind the rule is dealing with actual sums of income and not of capital, and upon that construction the Attorney-General agrees that his contention must fail.

For these reasons, therefore, I have come to the conclusion that the decision of Finlay J. is right and that the appeal must be dismissed with costs.

SLESSER L.J. I agree, and for the same reasons. I would only add that in my opinion an additional difficulty is placed in the way of the learned Attorney-General's argument by reason of the decision in the Scottish Courts in *Scottish Provident Institution* v. *Allan* (1), which was confirmed in the House of Lords. In that case, a question was argued on the ancestor of the section we have here to consider, whether income which had arisen from securities in Australia, being remitted to this country, was or was not to be regarded as falling within what was then the equivalent to r. 2 of Case V. of Sch. D in the 1918 Act, and it was held that the sums of interest so remitted were so inter-mixed with other funds that properly the sums received were to be regarded as amounts remitted as income. It is true that the argument which has been placed before this Court to-day was not canvassed in that particular case,

(1) [1903] A. C. 129; 4 Tax Cas. 409, 591.

but it is worthy of note that both in the Court of Session and in the House of Lords there is no suggestion that it was not material there to decide whether this money so remitted was in the nature of income or not. Had the Attorney-General's argument been right, it would have been a matter of no importance, once it had been decided that this was income arising in Australia, to consider whether it was income or whether it was capital in the United Kingdom, because in either case the income, on his argument, arising in Australia could be gauged for the purpose of its liability to income tax in this country under the rule as being a remittance from Australia payable in the United Kingdom. Yet the whole of the argument and the whole of the judgment and the speeches, as I have said, in the House of Lords go on the presumption that the essential question to be considered in application of this rule is whether the sum received is income or is capital. As I understand the Attorney-General, he is inclined to agree that, once the construction of the rule for which he contends fails and one reads in effect into the language: "the full amount of the actual sums annually received," the words "the full amount of the actual sums representing income actually received," then he cannot dispute the finding of fact of the Commissioners in this case that the sums here, as they say, were all derived from the proceeds of realization of investments owned by the lady before 1925 and not from income. I should have hesitated long before I should have done that which I think in effect would be running counter to the presumptions underlying the decision of the House of Lords in *Scottish Provident Institution* v. *Allan* (1), were the argument otherwise to commend itself to me, which it does not.

There is only one other matter I would mention, and it is this. The Attorney-General has pressed upon us this consideration, that the Commissioners have said that they "considered that in the absence of evidence to the contrary, there is a presumption that to the extent to which there is income arising in any country remittances received from that country are income and come within the charge to tax, but

(1) [1903] A. C. 129; 4 Tax Cas. 409, 591.

that such presumption may be rebutted." The learned Attorney-General argues that there is no such presumption. He points out that it is not a presumption merely of business practice, such as was mentioned in the case to which I have referred, but that, as a matter of presumption, as the language is there used by the Commissioners, if there be any presumption at all it is in favour of the subject, and that the Crown have to prove that they are entitled to exact the tax. He goes on to argue that in so far as there is no presumption, unless the construction for which he contends is right, it would put an impossible obligation upon the Crown and make a very complicated investigation before the Commissioners in any particular case to ascertain whether this would be capital or not. I am inclined to agree with him that there is no such presumption arising one way or the other, but I disagree entirely with the conclusion that, because there is no presumption—at any rate, no presumption that this is income—therefore, it follows that his construction is the right one. It seems to me that this matter is just such a matter of fact as the Commissioners are eminently suited to inquire into. They have inquired into it in this case and they have rebutted the presumption which is alleged.

I express no final opinion, but I would guard myself against it being thought that there is, as I see it, in their view such a presumption in favour of this being income other than it being capital. Beyond the ordinary obligation of the Crown to show that the subject is liable to tax, for the moment I cannot see that any presumption of law arises one way or the other.

ROMER L.J. I agree. Considering, first of all, r. 2 of the Rules applicable to Case V., the point that has to be determined is whether, when the rule refers to the " actual sums annually received in the United Kingdom," it means sums representing income or whether it means sums whether representing income or representing capital. It is to be observed that whether we construe the word " sums " in the one way or in the other, those sums are equally capable of being sent to this country in any one of the four methods, or the three methods, that are referred to in the rule. They can be sent in the form of remittances payable in the United Kingdom, or in the form of property imported, or in the form of money or value arising from property not imported. Those words, therefore, throw no light whatsoever on the question of what the meaning of the word "sums" may be. The question, therefore, which we have to determine under r. 2 of the Rules applicable to Case V. is precisely the same as the question we have to determine under r. 2 of the Rules applicable to Case IV. In both cases the question is whether the sums referred to as being received in the United Kingdom are sums representing income or whether they are sums, whether representing income or representing capital. If the learned Attorney-General is right in his contention that the word means sums, whether representing income or capital, this plainly follows, that, if a domiciled American residing in this country has an income in America of 500*l.* a year, but in the year of assessment receives a sum of 5000*l.*, representing the sale of real estate in America, the American is to be taxed upon 5000*l.* The Attorney-General naturally shrank from such a conclusion, and he says: "Oh, yes, but you must always remember that the Income Tax Acts are taxing income." I quite agree; I do remember it, but I remember it at an earlier stage in the argument than the Attorney-General asks me to remember it. When construing the word "sums," he asks us to forget it, and it is only when we come to consider what is the total amount upon which the tax is to be levied that he allows us to remember it. I remember it earlier, and, remembering it, I am satisfied, and I am clearly of opinion, that the word "sums" in both rules means, and means only, sums representing income.

For these reasons, which are really the same as those given by the other members of the Court and by Finlay J. and by the First Division of the Court of Session in the case to which our attention was called, I am of opinion that this appeal fails.

Appeal dismissed.

Solicitor for the appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Corbould, Rigby & Co.*

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MARSHALL *v.* LINDSEY COUNTY COUNCIL.

[1933. M. 3671.]

Negligence—Maternity Home maintained by County Council—No warning given to incoming patient that previous patient had puerperal fever—Patient contracting disease—Liability of County Council for negligence of staff.

The plaintiff entered the defendant Council's Maternity Home for her confinement. Some days earlier a case of puerperal fever had occurred in the Home, but the medical officers, in view of the disinfecting precautions taken, decided that it was not necessary to close the Home for a time to new patients. When the plaintiff was admitted to the Home she did not know of the case of puerperal fever nor was she informed of it by the matron, and in consequence, having, as the jury found, contracted the same disease and suffered a severe illness, she sued the defendants claiming damages, alleging negligence on the part of their servants:—

Held, (1.) (by Greer, Maugham, and Roche L.JJ.) applying *Evans* v. *Liverpool Corporation* [1906] 1 K. B. 160, and *Hillyer* v. *St. Bartholomew's Hospital Governors* [1909] 2 K. B. 820, that the defendants were not liable for the negligence or breach of duty, if any, on the part of the medical officers attached to the Home in deciding as they did, notwithstanding the case of puerperal fever before the admission of the plaintiff, that the Home should not be closed for a time to new patients, as in so deciding, they were not acting in a purely administrative capacity as the defendants' servants; but (2.) (Maugham L.J. dissenting) that the defendants were liable for the failure of their servant, the matron, in the course of her administration of the Home, to inform the plaintiff of the case of puerperal fever when she knew or ought to have known that by reason of the absence of warning there was grave risk of danger to the plaintiff.

APPEAL from a decision of Lawrence J. at a trial with a special jury at Lincoln.

The facts out of which the action arose are set out in detail in the judgments; shortly, they were as follows: The plaintiff, Mrs. Marshall, arranged to be admitted to the defendant Council's Maternity Home for the purpose of her confinement, and on July 12, 1933, she was admitted for this purpose. On June 30, 1933, a Mrs. Franklin had been admitted as a patient, and on July 4 she developed symptoms which turned out to be puerperal fever, a highly infectious disease, and which led to her removal to a general hospital. Shortly afterwards other patients also contracted the same illness. In consequence, as the jury found, of these cases the plaintiff also contracted puerperal fever while in the Home and suffered a severe illness, and in respect of this she sued the defendant Council alleging (inter alia) negligence on the part of the medical officers and matron in failing to inform her or her husband or medical attendant of the fact that there had been a case of puerperal fever in the Home a few days before her admission.

The following, among other questions, were left to the jury, which with their answers were as follows: "Was it a breach of duty not to refuse admission to the Home to new patients from July 5, onwards"? (A.) "Yes"; "Was it a breach of duty not to inform the plaintiff or her husband or her medical advisers of Mrs. Franklin's case"? (A.) "Yes." The jury also found that the plaintiff's illness flowed from the breach of duty alleged, and they assessed the damages at 750*l*., for which Lawrence J. gave judgment.

The defendants appealed.

Cave K.C., *Healy K.C.*, and *Sandlands* for the appellants. The legal obligation of the appellants, like that of other governing bodies of hospitals, was to see that the technique of the Home was such as was required by the general opinion of the medical and nursing professions, and they fulfilled their duty by appointing competent persons for the treatment of patients: *Evans* v. *Liverpool Corporation* (1); *Hillyer* v. *St. Bartholomew's Hospital Governors* (2); *Vancouver General Hospital* v. *McDaniel*. (3) In the first of these cases Walton J.

(1) [1906] 1 K. B. 160.
(2) [1909] 2 K. B. 820.
(3) [1934] W. N. 171.

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decided that there was no absolute undertaking or obligation on the part of the corporation which provided the hospital that no patient should be discharged by the visiting physician while still in a condition which might cause infection. That was approved in *Hillyer's* case (1), where Kennedy L.J. said (2): "But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal."

[GREER L.J. The question would appear to be whether the facts bring this case within that part of Kennedy L.J.'s judgment or the succeeding passage where he said: "It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants."]

That cannot be said to apply to the facts of the present case. When the medical officers decided that it was unnecessary that the Home should be closed to new patients from July 5, the absence of a warning by the matron to the plaintiff cannot be said to be a mere matter of administration; she was acting in accordance with the views of the medical officers. No one has said that it is the general practice to notify a new patient that there has been a case of infectious disease in the Home.

Jackson K.C. and *Winning* for the respondent. There was

(1) [1909] 2 K. B. 820.

(2) Ibid. 829.

an obvious duty on the part of those in charge of the Home to inform the plaintiff or her husband, or her medical attendant, that there was, a few days before the plaintiff's admission, a case of puerperal fever there. To allow the plaintiff to enter the Home in those circumstances was an act of gross negligence. There is no difference between this case and that of an ordinary invitee coming on to the invitor's premises; in such a case there is a clear duty on the invitor to give warning of any danger of which he knows or ought to know. In failing to give warning the matron was acting in an administrative capacity; she was simply making a contract on behalf of the appellants with the respondent for the admission of the latter, and she took upon herself not to warn the respondent. For that negligent omission the appellants are liable.

Cave K.C. replied.

Cur. adv. vult.

1935. Feb. 8. The following judgments were read :—

GREER L.J. At the trial at Lincoln before Lawrence J. and a special jury the plaintiff recovered judgment for 750*l*. damages for breach of contract and negligence. The defendants appeal on the ground that there was no evidence to support the findings of the jury, and, alternatively, they ask for a new trial on the ground that the verdict was against the weight of the evidence. The learned judge entered judgment in accordance with the verdict for 750*l*. damages, the amount fixed by the jury. In addition to their contentions as stated above, the defendants by their notice of appeal objected to the verdict and asked for a new trial on the ground that the damages awarded were excessive. Though this contention was not abandoned, counsel for the appellants did not think it worth while to put forward any argument in support of it, and, so far as my judgment is concerned, I am content to say that on this question I agree with the implied view of the appellants' counsel that there is nothing in this ground of appeal.

In order to deal with the other questions involved in the appeal it seems convenient in the first place to state the questions which, after consultation with counsel on both sides, were put to the jury to answer. The nature of the plaintiff's claim was, that by reason of the defendants' breach of contract in failing to supply her with a private ward and in failing to take proper measures for her treatment, and in failing to warn her that it was dangerous to admit her to the Home, she contracted puerperal fever and suffered from a very severe illness which occasioned her great pain and worry, and which lasted for a considerable time. The questions submitted to the jury, and their answers, were as follows :—

(1.) Was the contract to supply a private room subject to a condition that there should be a room available ? (A.) No.

(2.) Was the contract to supply such a room on July 4, or when she presented herself ? (A.) When she presented herself.

(3.) Was it varied by the plaintiff agreeing to enter a public ward ? (A.) No.

(4.) Was it a breach of duty not to refuse admission to the Home to new patients from July 5, onwards ? (A.) Yes.

(5.) Was there any breach of duty in the administration of the Home from July 4 to July 20 ? In what respect ? (A.) Yes. Swabs should have been taken from the whole of the staff immediately on the report of Mrs. Franklin's case.

(6.) Was it a breach of duty not to inform the plaintiff or her husband or her medical advisers of Mrs. Franklin's case ? (A.) Yes.

(7.) Did the plaintiff's illness flow from the breach of duty specified (*a*) in question 4 ? (A.) Yes, in our opinion. (*b*) In question 5 ? (A.) Yes. (*c*) In question 6 ? (A.) Yes.

Damages—750*l.*

With regard to the question arising as to breach of contract, it is to be observed in the first place that there was no claim for breach of an implied warranty that when the plaintiff on July 12, 1933, was invited into the Home and accommodated there in consideration of the contract to pay for the accommodation, the Home was reasonably fit for her reception. No such claim was made in the pleadings, no such claim was urged at the trial, and it must, therefore, be excluded from our consideration, and I express no opinion whether, if made, it would or would not have succeeded.

With regard to the claim for breach of contract as made at the trial, it seems to me that there was no evidence in support of the jury's finding on question 2. The plaintiff booked her room for July 4, and though that possibly might be subject to a margin either way, there was clearly no implied term that a room would be provided whenever she presented herself. Accordingly, it seems to me that the failure to provide a room when she presented herself on July 12 was not a breach of contract, and the verdict cannot be supported on this ground.

I further think that the answer to the third question cannot be supported. It is obvious that the plaintiff, with the knowledge that there was no private ward available for her, must be deemed to have entered into a new contract to accept a position in a public ward until such time as a private ward was ready for her.

With regard to the answer to question 4, it was the duty of Dr. Campbell and Dr. Stott to decide whether the Home should be closed to new patients from July 5 onwards. They, or one of them, decided that the Home was not to be closed to new patients, and in my judgment, on the authorities dealing with similar questions, the defendants are not responsible for any negligence or breach of duty, if there was any, on the part of either of these officials. It was not suggested that the defendants were guilty of negligence in that they had selected incompetent advisers. It seems to me that in so deciding, Dr. Stott was not acting in a purely administrative capacity as a servant of the defendants. He was acting as a hygienic specialist appointed by the Council by reason of his special skill and knowledge with regard to the incidence and prevention of disease. A similar objection must prevail with regard to the breach of duty alleged in answer to question 5. The decision as to what ought to be done lay with Dr. Stott, and if he wrongfully or negligently failed to advise that swabs should be taken from the whole of the staff immediately on the report of Mrs. Franklin's case, the defendants would not, in my judgment, be responsible for his wrong decision.

Very different considerations apply to the answers to questions 6 and 7, as it appears to me that the terms on which patients should be invited into the Home were matters of administration which were left to be carried out by the matron and those acting under her, and if they were negligent in relation to the admission of the plaintiff, I think their negligence would be the negligence of servants of the defendants acting within the scope of their authority. Whether there was any such negligence on their part is a matter which will have to be carefully considered. As to the last question, it seems to me, as will appear presently, that there was ample evidence that the plaintiff's illness flowed from the breach of duty found in answer to question 6, but I find it necessary to state the facts at some length in order to decide the question whether there was evidence on which a jury could act that there was negligence on the part of the matron and Nurse Siddle in failing to inform the plaintiff, or her husband, or her medical adviser, of Mrs. Franklin's case. It is also necessary to state the facts in some detail in order to come to a conclusion on the question whether the plaintiff's illness flowed from the duty specified, which I understand to mean, in this particular case, Did the plaintiff's illness happen as a consequence of Mrs. Franklin's illness? Before dealing with these last two questions I think I ought to deal with the learned judge's decision that the defendants were responsible for any negligence which might be established on the part of Dr. Stott. In my judgment the decision of Walton J. in *Evans* v. *Liverpool Corporation* (1) applies to the present case. It was approved in the Court of Appeal in *Hillyer* v. *St. Bartholomew's Hospital Governors* (2), and we are bound in this Court to follow it. *Evans's* case (1) dealt with the liability of the defendants for the negligence of Dr. Archer, the medical officer of the convalescent home where the plaintiff's son

(1) [1906] 1 K. B. 160.

(2) [1909] 2 K. B. 820.

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had been after having had scarlet fever, in giving instructions for the boy's discharge. The action was not brought on behalf of the patient in respect of any damage suffered by him from negligent clinical treatment, but was for damages suffered by his father through his other children catching scarlet fever. The decision of the doctor who was alleged to have been negligent was not a decision in relation to treatment, but was a decision in relation to the question whether he had taken the necessary precautions to prevent the spread of the disease. In the course of his judgment the learned judge said (1): "They [the defendants] do not undertake the duties of medical men or to give medical advice, but they do undertake that the patients in their hospitals shall have competent medical advice and assistance, and it is admitted that Dr. Archer was a competent medical man, and that no blame attaches to the defendants for employing him. Assuming that he made a mistake, even a negligent mistake, I do not think that the defendants are liable for its consequences; they have done all that the parent himself could have done, had he been able to have his son treated in his own house; he could not have done more than provide a proper home for the boy, and provide nurses and good medical attendance." Later on he says (2): "As I have already said, I do not think the argument is well founded that the discharge is a discharge by the doctor as the servant of the defendants, and that they are liable for the consequences of his negligence. What the doctor really does is to advise the corporation, and he gives his opinion as a medical man. If the defendants have employed a competent, skilful, and duly qualified medical man, they have done all that it was possible for them to do—they cannot control his opinion in any kind of way: indeed, it would be wrong for them to attempt to do so; all they can do is to employ a competent medical man, and to act upon his opinion and discharge the patient. In my opinion there was in the present case no ground of complaint—no cause of action—against the defendants."

(1) [1906] 1 K. B. 165. (2) Ibid. 166.

It is clear that in that Liverpool case the principle which the Court applied in *Hillyer* v. *St. Bartholomew's Hospital Governors* (1) to the case of an operating surgeon, was applied by Walton J. to the responsibility of a hospital authority for the negligence of a doctor occupying a post similar to that which was occupied by Dr. Stott in this case. Therefore, if the defendants are to be held liable in this case, it must be on the ground that the jury were entitled to find as they did in their answers to questions 6 and 7.

The material facts on which the decision in this appeal turns are as follows: the defendants acting under statutory powers were the proprietors of certain maternity homes in the area subject to their jurisdiction. All these homes were under the general supervision of the county medical officer, Dr. Campbell, who was appointed by the Council, and could only be dismissed with the consent of the Ministry of Health. For the special supervision of the Cleethorpes Maternity Home, with which this action was concerned, the Council appointed Dr. Stott, who was their assistant medical officer, to be medical superintendent. Both these medical men visited the Home from time to time, Dr. Stott more frequently than Dr. Campbell. Neither of them had any clinical duties to perform at the Home; these were performed either by the patient's own doctor, or by doctors summoned from an approved panel. The doctors attending patients were solely responsible for their clinical treatment. They had, of course, nothing to do with the general management of the Home, and any decision whether the Home ought to be closed, or what steps should be taken to prevent the spread of puerperal fever in the Home, was necessarily left to Dr. Campbell and Dr. Stott. The latter had, of course, to advise the Council from time to time through the appropriate committee, but if an emergency arose which made it necessary or advisable for them to act without delay, they could on their own authority either close the Home or take such other measures as they thought might be necessary to make the Home hygienically safe. In performing these duties as medical officers of special skill in the prevention of disease, they were, as I have already held, not acting as servants of the Council, but were medical experts who were bound to act on their own skill, knowledge, and judgment. They had, moreover, nothing to do with making contracts with incoming patients. The decision as to these matters was necessarily left to the matron and her deputies in the ordinary management of the Home.

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(1) [1909] 2 K. B. 820.

In January or February, 1933, the plaintiff called at the nursing home, saw the matron, and told her that her doctor had recommended her to go to the Home to be delivered of her baby which she expected on July 4, that she wanted a private ward, and that her own doctor would attend her. The matron stated that the terms were four guineas a week, and said that the room would be ready then and the plaintiff need not come again until the time. She did not go again until July 12, and it seems to me, as I have said, there was no contract that she should have a private room whenever she presented herself. It would be impossible to carry on a small home like the Cleethorpes Maternity Home on the terms that a private room should be available at any time when an incoming patient presented herself.

On July 12 the plaintiff was brought to the Home by her husband, and a conversation took place which will be stated in its chronological order. In the meantime important events had happened in the Home which made it, in fact, a dangerous place for her to be invited to enter on July 12. On June 30 a Mrs. Franklin was admitted to the Home. She was taken to Ward 7, a ward which was intended to be used as an isolation or separation ward, but which at the time was used for receiving and accommodating patients. Mrs. Franklin was taken immediately to Ward 7, remained there until the birth of her child became imminent, when she was taken to the theatre or labour ward and there delivered of her child by Nurse Siddle. She was delivered at 7.30 on the morning of July 1, and according to Nurse Siddle after her baby was born she was taken back to Ward 7. On July 2 she was taken to the Gray Ward, where there were then two other patients,

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Mrs. Cudmore and Mrs. Towle. Nurse Siddle continued to attend to Mrs. Franklin, changing her swabs from time to time. On July 3 her temperature in the morning was 100·4, and in the afternoon 100·6. Under the Statutory Rules relating to infectious diseases it was necessary that her condition should be notified as a case of puerperal pyrexia, which in the regulations is defined as a temperature of 100·4 or over, lasting for twenty-four hours or repeated twice in the twenty-four hours. It seems probable that though a temperature of this kind may be due to other causes than infectious disease, it was made notifiable because such a temperature is a warning that the patient may be suffering from the early stages of puerperal fever, as we now know was the case with Mrs. Franklin. On the evening of July 4 her temperature went up to 105. Dr. Deighton was called in to her, and he diagnosed appendicitis and sent her by ambulance to Grimsby General Hospital for observation and, if necessary, operation. But there can now be no doubt that he was mistaken, as Dr. Chapman, an experienced gynæcologist at the Grimsby Hospital, at once diagnosed puerperal sepsis, and expressed it as his opinion that she must have been in a condition of sepsis before she left the Home. His view of the case was accepted as right by Dr. Stott and by the matron of the Home. Puerperal sepsis is a very dangerous and highly infectious disease caused by the presence of identifiable bacteria in the genital tract of a woman in or after labour. It is frequently fatal, as it was in the case of Mrs. Franklin, and according to evidence which the jury were entitled to accept the bacteria may be conveyed from patient to patient either by physical contact or by propinquity, and may be carried by nurses in their throats and noses, and by them passed on to patients recovering from childbirth. The particular microbes or bacteria which cause the condition are known as streptococci pyogenes—type Glover.

The patient may suffer from a serious attack or from a mild attack. The infection of a mild attack may, according to one of the defendants' witnesses, Dr. Oxley, be as great or greater than the infection from a severe attack. When Mrs.

Franklin was sent away on the evening of July 4, the matron on her own responsibility caused certain precautions to be taken with regard to the nurses and the Gray Ward. The nurses had lysol baths and appropriate gargles. The two patients who had been in the Gray Ward with Mrs. Franklin were removed to No. 7. The Gray Ward was closed, disinfected in the usual way, by burning sulphur candles, spraying the walls, washing the floor, and sealing the room until the next morning, after which the windows were opened and fresh air let into the room. The bedding from the bed which had been occupied by Mrs. Franklin was not moved at the time, as the man who usually disinfected the bedding was not available. On July 10 the bedding was taken away and thoroughly disinfected. Until this was done the room remained closed but not sealed. According to Nurse Hetherington the theatre was also disinfected in the same way between the night and the morning, but the theatre did not, like the Gray Ward, remain closed, there being no other ward which could be used as a labour ward. On the morning of July 5 news came through from the General Hospital that Mrs. Franklin's case was one of puerperal sepsis. Dr. Stott visited the Home and was told by the matron what steps had been taken. He was apparently satisfied, but gave instructions that the bedding which had been used in the Gray Ward should remain there until the sanitary man took it away to be completely disinfected. He apparently thought it was safe not to close the Home to further patients, and that the steps by way of disinfection were adequate. Oddly enough, nothing appears to have been said or done to disinfect Ward 7, where Mrs. Franklin had been for two days. Nurse Siddle, the nurse who had delivered Mrs. Franklin, was as a matter of precaution put off duty for twenty-four hours, and in fact remained off duty for two days, as a day of her leave was owing to her at the time. On July 9 a Mrs. Fleming was admitted to the Home, and after a blanket bath, she being very near her confinement, was taken to the labour ward and there delivered by Nurse Siddle at ten minutes past nine, and then sent to the Oak Ward. On July 10 she developed a temperature of

100·6 and had a similar temperature next morning. The case, therefore, became notifiable and was notified as puerperal pyrexia. This condition is probably regarded as a warning that the case might turn out to be one of temperature caused by the presence in the genital tract of streptococci pyogenes—type Glover. Later, when there was a serious outbreak in the Home of puerperal fever the swabs from Mrs. Fleming were biologically tested and it was found, though no serious consequences happened to her, that there were in fact present in her genital tract the particular germs which cause puerperal sepsis. This was expressly admitted by the defendants' counsel at the hearing of this appeal. It seems probable, therefore, that she suffered from a mild attack of puerperal fever, but either because she had greater powers of resistance than other less fortunate women, or received greater assistance from her treatment, she did not in fact develop any serious illness. On July 12, before the plaintiff entered the Home, four other patients came in, Mrs. Hardy, Mrs. Johnson, Mrs. Ladlow and Mrs. Fussey. With the exception of Mrs. Ladlow they were all delivered by Nurse Siddle. Mrs. Ladlow was delivered by the matron, but it was common ground that all these ladies were attended by Nurse Siddle, who changed their swabs. On the evening of July 12 Mrs. Marshall and her husband arrived at the Home, the latter having telephoned to the Home to say that he was bringing his wife and having received the answer that everything was all right and she could come in. On arrival she was received by Nurse Siddle, who was the night nurse in charge, and she and her husband were told that there was not a room then available and that she would have to go for a time into a ward with the other ladies. After some hesitation she and her husband decided that she would enter the Home on the understanding that she would be put in an ordinary ward and as soon as possible removed to a private ward. Nothing was said to them about the case of Mrs. Franklin, or the precautions that had been taken to prevent infection. On instructions which Nurse Siddle had received from the matron, the plaintiff was taken to Ward No. 7, and waited there until it was time for her to be taken to the labour ward, where she was delivered by her own doctor, or rather, Dr. Thompson, his assistant. She was afterwards placed in the same ward as Mrs. Fussey and Mrs. Towle. On July 16 all the four ladies other than the plaintiff, who entered the Home on July 12, developed the warning temperature, and on that evening it became plain that there was for some cause a serious outbreak of puerperal fever, and the four ladies were on the instructions of a specialist, Lieut.-Colonel Stephen, who was called in, sent to the Scarthoe Fever Hospital. The plaintiff did not develop the warning temperature until July 17, and was not evacuated from the Home to the hospital until a few days later.

It was common ground at the trial that Mrs. Marshall suffered from puerperal sepsis, and it was admitted in the pleadings and in the evidence of the doctors and the matron that she contracted the disease in the Home. It was stated by Dr. Stott, and I think also by Dr. Campbell, that all the five ladies were infected from a common source. None of the medical witnesses could point to any common source of the disease from which these ladies suffered other than the case of Mrs. Franklin, though they seemed to be surprised that the infecting microbes had survived the disinfection that had taken place in the Home. In her evidence the matron stated that when she knew of Mrs. Fleming's rise of temperature she wondered whether the disinfection had succeeded in eliminating the infective germs from the Home, or words to that effect. At one time in her cross-examination she admitted that a very considerable number of the nurses and patients could be deemed to be contacts with the plaintiff. There was great difference of opinion between the experts on the question whether the plaintiff ought to have been told about Mrs. Franklin's case and the risk of infection, or as to any risk of infection in the Home.

In the course of his summing-up, the learned judge pointed out that Dr. Montgomery, who was called in to attend to Mrs. Fleming, had not been told about Mrs. Franklin's case. This seems a little odd, as it might have helped him in his diagnosis, but be that as it may the judge adds: "You will have

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to consider whether this method of treating these doctors is a reasonable one; whether it shows reasonable skill and care not to inform the plaintiff's doctor that there had been this case of puerperal sepsis, and it throws some light upon that that Dr. Montgomery was not informed about the case either when he had to consider the case of Mrs. Fleming, which may have been, I think all the doctors are agreed that it may have been, although they do not think it was, because they have this complete belief in disinfection, but they are all, I think, agreed that Mrs. Fleming might conceivably have been a connecting link between Mrs. Franklin and the outbreak which later on took place. Certainly Dr. Oxley thought it may be so." And later he says: "Now as to the question of whether the knowledge of the previous case ought to be disclosed, both Dr. Thompson who gave evidence for the plaintiff, and Dr. Chapman said that they thought it ought to be. All the other doctors, with certain exceptions, said that they thought it ought not to be. Dr. Montgomery said this. You remember I put the question to him, I think, and he said: 'Well, I should have very much appreciated it, if I had been told about Mrs. Franklin'."

Dr. Thompson gave evidence which, if accepted, would show that the disinfection was inadequate. He thought that the labour ward ought to have been closed for four or five days.

Certain correspondence was put in, in a bundle numbered 14, between the Ministry of Health and the defendants. From that it appears, and was admitted before us, that Mrs. Fleming's case and the case of the other five ladies showed the presence of the typical germ. It seems clear too that Dr. Janet Campbell, of the Ministry of Health, suspected that Nurse Siddle was infected by Mrs. Franklin, and passed on the disease, and that notwithstanding the negative results of the examination of the swabs from Nurse Siddle's throat and nose the County Medical Officer, Dr. Campbell, still remained suspicious of Nurse Siddle, and that Dr. Allison took the view (see his letter of July 26) that it was not improbable that Nurse Siddle was a carrier of hæmolytic streptococci, and that his failure to find the typical germ might be due to a temporary disappearance due to gargling. Amongst the papers is a second analysis of the swabs from some of the nurses. The swabs from Nurse England, the night nurse who attended Mrs. Franklin, showed a few hæmolytic streptococci present—type Glover, and in the swabs from Nurse Holmes, who had a good deal to do with attending the patients though she did not deliver any of them, there were found numerous hæmolytic streptococci present—type Glover.

Upon these facts I find it difficult to differ from the conclusion adopted by the jury that the cause of the outbreak was the introduction of the disease germs in Mrs. Franklin's case, which the efforts of those in the Home in the way of disinfection failed to eliminate. I think the causation is sufficiently proved for the purposes of a trial by jury. Absolute certainty is not attainable, but I think it is highly probable that the plaintiff's illness was caused by the infective germs introduced into the Home by Mrs. Franklin's case, and remaining there and multiplying notwithstanding the efforts made to expel them by disinfection. It is so highly probable that I do not find myself able to say that we can interfere with the verdict of the jury on this part of the case.

I have had some doubt and difficulty with regard to the jury's answer to question 6, but on consideration I have come to the conclusion that there was sufficient evidence to justify the jury's finding. The matron knew what disinfection had been done in the Home; she at one time suspected that Mrs. Fleming's case raised a doubt whether the disinfection had been successful in eliminating the infective germs; she knew that the Home was unusually full and that the only accommodation that was available on the night of July 12 in which to receive the plaintiff was Ward No. 7 in which Mrs. Franklin had been and which had never been disinfected.

In my judgment there was evidence in which the jury could find that she was negligent in admitting the plaintiff on the night of July 12 into the Home without warning when she knew, or ought to have known, that there was grave risk of danger to the plaintiff if so admitted.

For these reasons I feel myself unable to say that the defendants' appeal should be treated otherwise than by dismissing it with costs.

MAUGHAM L.J. This is a case of both difficulty and importance, and I think the Court has to be careful not to allow natural sympathy with the plaintiff to lead to a decision not justifiable in law. The action was one for damages alleged to have been sustained by the plaintiff by reason of her contracting puerperal fever whilst in a Maternity Home at Cleethorpes belonging to the defendant County Council. It is admitted on behalf of the defendants that the plaintiff contracted puerperal fever whilst she was in the Home. So far as the action is based on negligence the plaintiff has to show that she contracted the disease by reason of the negligence of persons for whose acts the defendants were responsible; and this plainly requires proof of two very different things: first, that the plaintiff has suffered injury by reason of a breach of duty amounting to negligence on the part of some person or persons employed at the Home; and, secondly, that the acts amounting to breach of duty were acts done as the servants or agents of the defendants.

The circumstances are exceptional owing to the special nature of such an institution as the Cleethorpes Maternity Home. The building is one established by the defendants for the purposes of providing a suitable building, including a staff and up-to-date appliances, at which women in the district may be confined. They are delivered either by midwives who reside in the building or by the private or the panel doctors of the women who resort to the Home. Those who are in a position to pay, pay either two guineas a week if they do not occupy a separate ward, or four guineas if they have a private room. The staff consists of a matron and some half a dozen nurses. There is no resident medical officer nor any visiting medical staff in the sense of any doctor who renders any clinical assistance. There is, however, a superintendent medical officer, Dr. W. B. Stott, who resides in the neighbourhood, to whom every question of importance relating to the management of the Home is referred. Dr. Stott acts under the directions of Dr. Campbell, who is the County Medical Officer of Health, but he resides some forty miles away at Lincoln, and is not consulted by Dr. Stott except for some special reason. The nurses are under the control of the matron, a Miss Jackson, and there are also two male attendants who perform, amongst other things, the disinfection of the wards and appliances and beds whenever required.

The Home is thus of the nature of a nursing home confined to maternity cases. It is subject to the provisions of the Maternity and Child Welfare Act, 1918, and frequent reports as to its management are made to the Minister of Health. It has room for some sixteen beds, of which a few are in private rooms. The Home is supported partly by payments made by those of the patients who can pay, partly by a grant made by the Ministry of Health, and the balance is supplied by the defendants out of the rates. It is, I think, beyond doubt that the Home ought to be conducted with a view to the interests not only of the patients in the Home at the time, for whom all reasonable precautions for safety and comfort must be made, but also with the view to the interests of other expectant patients. It is not a Home conducted with a view to profit like an ordinary nursing home. There is, of course, a list kept of the women expecting babies with the dates at which they expect to be confined, and it seems that " the bookings " and the admissions sometimes throw a considerable strain upon the accommodation available.

Besides the claim based on negligence it was asserted that there was a breach of contract on the part of the defendants, based on an alleged contract between the plaintiff and the defendants acting through the matron of the Home that the defendants should reserve for the plaintiff a private room in the said Home in consideration of a payment of the sum of four guineas per week. It was her first baby and it should be noted that the plaintiff was to be attended by her own medical attendant, Dr. Williamson, during the period she remained in the Home. It is not in dispute that the plaintiff asserted that she would be confined at the end of June, 1933, or the beginning of July, and the date fixed as far as it could be fixed was July 4. The room was kept vacant for her for some days, but as she did not come and made no communication with the matron the private room was filled with another patient. In the circumstances I do not think it necessary to add anything to what Greer L.J. has said in regard to the question of breach of contract, for in my opinion it is clear that there was none.

On July 12, at 11.30 P.M., the plaintiff's husband rang up to say that she was expecting a proximate delivery. Some one on the telephone told them to come along, and she arrived with her husband shortly before midnight on that day. She was delivered on the following day, and a few days later was found to have contracted puerperal fever and thereby suffered substantial damage. The writ was issued on November 17, 1933, and the case was tried with a special jury at Lincoln in June, 1934. The findings of the jury are set out in full by Greer L.J., and I need not repeat them. It is important at the outset to note the positions occupied by Dr. Stott and Dr. Campbell. The former is the Medical Officer of Health to the Cleethorpes Urban District Council, the Medical Officer of Health to the Grimsby Rural District Council and the assistant County Medical Officer of Health and Medical Superintendent of the Cleethorpes Maternity Home. In the last mentioned capacity the Home has been under his charge since it was opened in 1929, and he visits it at least once a week. He is also frequently called in by the matron on matters relating to the management and administration of the Home on the medical side. There is nothing in writing specifying his duties. He is remunerated as a Medical Officer of Health, but in performing his functions he is not, in my opinion, acting as a servant of the defendants. He has a number of statutory obligations and his true position can be gathered from Part II. of the Sanitary Officers Order, 1926, dated May 27, 1926, made by the Minister of Health (Lumley, 10th ed., vol. iii., p. 3613). He cannot be removed, nor can his salary be varied without the consent of the Minister of Health. He is not allowed to practise and he has no clinical duty in connection with the Home. If a patient requires medical attention, the matron calls in the patient's own doctor or one of the doctors on the panel.

Dr. Campbell is the County Medical Officer of Health. The defendants have appointed a Maternity and Child Welfare Committee, and a sub-committee of that body deals with the Cleethorpes Maternity Home. It meets every two months and receives reports and keeps minutes. Dr. Campbell is present and answers questions as to the Home. It is not suggested that the sub-committee is competent to deal with any medical or quasi-medical matter, nor that it has ever tried to do so. Dr. Campbell, like Dr. Stott, is independent of control by the defendants. He is removable only with the consent of the Minister of Health, and his duties will be seen by reference to ss. 68 and 69 of the Housing, Town Planning, etc., Act, 1909. In these circumstances I think the learned judge was wrong in directing the jury that Dr. Stott and Dr. Campbell were the servants of the defendant Council. It is true that they were concerned with the administration of the Home; but it is not, I think, true that they performed these duties as the servants of the defendants. They perform them as part of their duties as Medical Officers of Health, and free from dictation or interference by the defendant Council. The position of the matron and nurses is a different one. They are no doubt engaged and paid by the defendant Council and can be dismissed in the same manner; but the only inference that can be drawn from the evidence is that the matron and nurses are under the supervision of Dr. Stott and Dr. Campbell and have to obey their instructions.

The facts have been stated by Greer L.J. and I will only attempt a summary of them. Mrs. Franklin, a patient at the Home, was admitted on June 30 and delivered on July 1. On the morning of July 4 she had a temperature of 100·4° and suffered from pain. This was a case of puerperal pyrexia which might be due to many causes, puerperal fever being one of them. She was being attended by her own doctor, Dr. Deighton. He diagnosed the case as one of appendicitis. In the evening the fever rose to 105°, and Dr. Deighton, after attending the case with his partner, who agreed with his diagnosis, had the patient removed to the Grimsby and District Hospital. This was duly reported to Dr. Stott, and the disinfection precautions of fumigation and spraying, usual in every case of puerperal pyrexia, were taken on that day. On the patient reaching the Hospital the case was diagnosed by Dr. Chapman as one of puerperal fever. On July 5 that opinion was reported to the matron of the Home, and by her to Dr. Stott and by him in turn to Dr. Campbell. Dr. Stott called himself at the Home and gave detailed instructions on July 5 as to what was to be done as regards disinfecting the wards, the clothes and so forth. The whole staff had already had disinfectant baths and were gargling their throats with disinfectant. Nurse Siddle, who had delivered Mrs. Franklin, was put off duty for forty-eight hours and came back on July 8. I think it important to observe that Dr. Stott was quite satisfied with the precautions taken, and directed special precautions to be taken as regards the Gray Ward, where Mrs. Franklin had been while she had a temperature, and it was kept closed till July 11. He never suggested closing the Home to further patients, and has given evidence that he thought that such a course, as also the giving of a warning to any one, was quite unnecessary.

On July 12 another patient, Mrs. Fleming, who had been admitted on the 9th and delivered shortly afterwards, had a temperature which was diagnosed by her doctor, a Dr. Montgomery, as due to erosion of the cervix. The case was reported to Dr. Stott and the usual disinfectant precautions were taken as in every case of temperature over 100·4°, whatever its cause. The illness of Mrs. Fleming was never diagnosed at the time as a case of puerperal fever; the fever was a not unusual symptom, and Dr. Stott saw nothing alarming about it. It is, however, possible that it was a case of mild puerperal fever.

On the evening of July 12 at about 11.30 P.M. the plaintiff's husband, as I have stated, rang up the Home and said she was coming in at once, and she and her husband arrived at the Home a little before midnight. She said that she was expecting a private room, but she was told there was not a private room available, and after some conversation she agreed to share a room with other patients and was put in Ward 7 (the Separation Ward) with Mrs. Fussey and Mrs. Ladlow, who had both arrived on that day. The Home was then full. The plaintiff was expecting immediate confinement and was taken to the labour room, the name given to the surgical room where all confinements take place; but was brought back when it became apparent that the birth was not quite imminent. Her doctor was Dr. Williamson; but he was not available, and his locum tenens, Dr. Thompson, delivered her on the night of the 13th, the matron and another nurse (Holmes) being present. After confinement she was removed to the Grant Ward, where Mrs. Fussey and Mrs. Ladlow were by that time. By that time and on July 15 everything was normal in the Home. Mrs. Fowle and Mrs. Cudmore, who had been in the Ward with Mrs. Franklin, had developed no symptoms of fever or illness. The matron, Dr. Stott and Dr. Campbell did not think that any risk of infection from Mrs. Franklin was left after the various measures of disinfection which I have mentioned. That unfortunate lady, however, died on July 13 in Grimsby Hospital; the jury have plainly taken the view that she died of puerperal fever, and there was ample evidence to justify that view. On the morning of July 16 Mrs. Fussey and Mrs. Ladlow developed temperatures, and in the afternoon Mrs. Johnson and Mrs. Hardy also did so. Mrs. Fussey and Mrs. Ladlow were taken out of the Grant Ward, leaving the plaintiff alone there. It was a Sunday. The matron first spoke to Dr. Montgomery, who was visiting a private patient. She then telephoned to Dr. Stott, who was out, and then to Colonel Stephen, a consulting obstetrician appointed by the defendants. He came and recommended that the four ladies mentioned should be taken by ambulance to the Scarthoe Road Infirmary. On the 17th the plaintiff had a temperature of 102·4°. Her own doctor, Dr. Brown, a partner of Dr. Williamson, came in and gave instructions as to her treatment. Dr. Stott and Dr. Campbell both came on the morning of the 17th, and it was decided to close the Home to fresh patients for the time;

for the events of the 16th had shown that they had to deal with an outbreak of puerperal fever. The plaintiff had contracted the disease and was removed on the 20th. It may be added that between the time Mrs. Franklin was delivered and the plaintiff was delivered there were sixteen women delivered at the Home. Of these women five, including Mrs. Franklin, had puerperal fever, and Mrs. Fleming may possibly have had it. Two died, Mrs. Franklin and Mrs. Fussey (and her baby). Ten were free from any illness.

These, as it appears to me, are the leading facts in the case; but in considering the plaintiff's claim that she contracted puerperal fever owing to the negligence of the defendant Council we ought not entirely to omit to take into account a background of circumstances of common general knowledge (constantly alluded to in the daily Press) which were indeed touched upon by the experts in the case. This disease is mysterious in its origin in any particular case and in its outbreak in a Home. It was made a notifiable disease in 1899. Notwithstanding all the experience and skill of many able and devoted men during the past thirty years this dangerous illness, arising in connection with so normal an event as childbirth, has not diminished, if indeed it has not become more common, and knowledge of its causation and mode of origin is still very imperfect. It is a singular fact that it attacks the mothers who are relatively well off more frequently than those who are poor. There is no maternity home, no hospital or hospital ward devoted to maternity cases in the land which with all its precautions has so far been able sensibly to diminish the incidence of puerperal fever. With this brief account of the outbreak I stop to say that the issue of negligence in the case depends on whether it was negligent to admit the plaintiff, or to admit her without warning, to the Home late on the night of July 12 with the knowledge then possessed by the matron, Dr. Stott and Dr. Campbell, and having regard to the elaborate precautions against infection taken both as a matter of ordinary routine and also in consequence of the statement from Grimsby received on the 5th that Mrs. Franklin was suffering from puerperal fever. The only other alleged breach of duty is that swabs were not taken from the whole of the staff of the Home immediately on the report that Mrs. Franklin's case had been diagnosed at the Grimsby Hospital as a case of puerperal sepsis, i.e., on July 5. The jury have answered every question put to them in a sense favourable to the plaintiff, and the question for this Court must be whether there was evidence to support their findings. Except as regards the swabs there is no finding that there was any negligence in the important matters of disinfection and sterilization.

I will deal first with the question whether it was the duty of the defendant Council to refuse to take in the plaintiff late at night on July 12 in the circumstances I have mentioned. This contention on the part of the plaintiff is equivalent to the contention that the Home should have been closed to fresh patients on July 5 for an uncertain time and, at any rate, till after July 12, the date when the plaintiff was admitted. I have mentioned the elaborate precautions of sterilization which were taken in the Home on July 4 and 5. The jury must, I think, be taken to have accepted the view that sterilization was not in fact a sufficient or a satisfactory safeguard against infection from the hæmolytic streptococci which cause puerperal sepsis. I will assume for the purposes of the inquiry upon which we are embarked that they were justified in that view; but I must observe that that takes us only a very little way. The whole technique of disinfection and sterilization adopted and followed in the Home was one approved by Dr. Stott and Dr. Campbell, whose competence as medical officers is not attacked. The issue of negligence so far as this part of the case is concerned will therefore depend on whether it was negligent of the defendants to follow and to rely on a technique approved by Dr. Stott and Dr. Campbell. In my opinion there was no evidence upon which the jury could so hold. But that is not all. The practice of the Home in not refusing fresh patients after a single case of puerperal sepsis had occurred, taking, however, the recognized sterilization precautions, is in accordance with the universal practice of maternity homes and hospitals throughout England. The Ministry of Health is in constant communication with the authorities in charge of maternity homes and hospitals. It has held many inquiries and has issued a number of reports and leaflets in connection with the problem of reducing maternal mortality. It is not suggested that the Ministry has ever proposed the drastic step which the jury appear to favour. In these circumstances I am of opinion that the defendant Council, assuming their responsibility for the acts of the medical officers and nursing staff, have acted in accordance with the recognized practice and are therefore free from liability on the ground of negligence. This is a matter of great importance in relation to the powers of juries. An act cannot, in my opinion, be held to be due to a want of reasonable care if it is in accordance with the general practice of mankind. What is reasonable in a world not wholly composed of wise men and women must depend on what people presumed to be reasonable constantly do. Many illustrations might be given and I will take one from the evidence given in this action. A jury could not, in my opinion, properly hold it to be negligent in a doctor or a midwife to perform his or her duties in a confinement without mask and gloves, even though some experts gave evidence that in their opinion that was a wise precaution. Such an omission may become negligent if, and only if, at some future date it becomes the general custom to take such a precaution among skilled practitioners. Another illustration is afforded by the recent decision of the Privy Council in *Vancouver General Hospital* v. *McDaniel* (1) and the remarkable facts therein stated. The case was not tried with a jury, but I do not doubt the general truth of the observation in the judgment that a defendant charged with negligence can clear himself if he shows that he has acted in accord with general and approved practice.

I turn now to the jury's finding that it was a breach of duty not to inform the plaintiff or her husband or her medical advisers of Mrs. Franklin's case. This means that the matron

(1) [1934] W. N. 171.

or a nurse should have informed the plaintiff or her husband when they arrived at or about midnight on July 12 that a Mrs. Franklin who had left the Home eight days before had had her case diagnosed as one of puerperal fever, that all the proper and usual steps of sterilization had been taken under the supervision of the matron and of Dr. Stott, the Medical Officer of Health, and that it was for the plaintiff to decide whether she would enter the Home or try at that hour to get suitable accommodation and attendance elsewhere. I find to my regret that I take on this point a view entirely differing from that of my learned brethren, and I feel compelled with great respect to them to express it. In the first place it should be noted that no medical witness on either side thought that the warning should have been given to the plaintiff herself. Next, should the husband have been warned? I think it would place him in a cruel dilemma. Ought he to tell his wife? After all, she is the person mainly involved. Or should he consult his mother-in-law? There is no evidence that that could have been done in the circumstances. Suppose that the husband, alarmed at a warning which obviously supposes a risk of infection, determines to take his wife away, he must, I suppose, tell her of the risk, however nervous she may be, and take her elsewhere. But where? There is no evidence that at that time of night she could have been properly attended at her own home or that she could have gone to another home or maternity hospital, and beds at these places are apt to be "booked up." But suppose he found her a bed elsewhere after a night journey, is there any evidence that she would there be more safely placed? The evidence shows that it is not the practice of any maternity home or hospital in England to tell patients or their friends anything about recent cases of puerperal sepsis or pyrexia in the institution. It is, however, said that the patient's doctor should be told; and, no doubt, unlike the woman and the husband, he has expert knowledge which might enable him to form a view as to the risk arising from a recent case of puerperal sepsis, regard being had to the two vital factors, the time when the case was removed, and the nature of the disinfectant precautions. But what is to be his course of action? It cannot be right for him to act without informing the woman or her husband if he thinks there is an appreciable risk. In that case he must so inform one or the other. There would be nothing alarming in this view if the warning could be given a week or so before the expected event; but in such circumstances as existed here the step suggested seems to me to have been practically impossible. The hour was midnight, the lady's doctor was apparently away, there was the difficulty of getting a bed elsewhere, and on the top of all this there was the serious objection of keeping the expectant mother waiting, I suppose in a lobby, whilst telephonic or other communications with her doctor were in progress, and whilst efforts were being made to find some other suitable home. My conclusion is that the usual practice of maternity homes and hospitals on this question of warning is founded on good sense, and that having regard to this practice, and to the general considerations above stated, it was not open to the jury, particularly in the special circumstances, to find that the absence of warning constitutes negligence. It may be added that Dr. Thompson, who in fact delivered the plaintiff, was not the doctor who had been engaged to attend her. That was Dr. Williamson, and there is no evidence as to who would and could have answered the telephone if the matron had considered it her duty to ring up Dr. Williamson. It is a singular example of the different views entertained by medical men that Dr. James Brown, who was Dr. Williamson's partner (Dr. Thompson being a locum tenens or assistant), and who was called as a witness for the defendants, gave evidence that if he had been informed as to the facts he would have permitted the plaintiff to enter the Home. I should add that the jury have not found that any warning should have been given as regards Mrs. Fleming who, at the time, was regarded by her own doctor as suffering from erosion of the cervix.

But the further question arises whether the defendants in such a case undertake as regards a patient who is admitted to and treated in the Home any duty beyond that of providing a building and appliances suitable for the purposes of such an institution, and the attendance of duly qualified persons therein. As I have already stated, the matron, if in any doubt on a question of the management of the Home from a medical point of view, had to consult Dr. Stott or Dr. Campbell, and these gentlemen were not in any sense servants of the County Council. I see no reason to infer from the facts proved that the County Council had a duty or indeed the power to insist on any line of treatment or on any method of disinfection of the Home or to interfere in any way with its management from a clinical point of view. Nor, in my opinion, is there any evidence from which the inference can be drawn that the question whether a particular warning should be given to a lady coming in for her immediate confinement was one to be decided by the defendants or by some sub-committee or agent appointed by them. Such a matter impinges so closely on the matter of treatment after admission and of discharge from the Home after confinement that I think it is inseparable from these questions, and I cannot agree that it is a matter of administration left to be carried out by the matron irrespective of the directions of Dr. Stott and Dr. Campbell. Whether there is any need for a warning in any given circumstances, and whether more harm than good may not result from a warning given to an agitated woman or her husband by giving a warning, are matters to be weighed in the light of expert knowledge and experience. Nor do I think that any useful rule could be framed by the defendants for the guidance of the matron with expert assistance. The nature of the risk, if any, which has to be run upon admission, the emergency of the case, the position in life and other circumstances attending the expectant mother and her husband, apart from the difficulty of obtaining admission or treatment elsewhere, are all matters to be considered. The main thing is of course the estimate of remoteness of risk. If the independent medical advisers of such a Home having taken the necessary precautions do not think it expedient to close the Home to fresh patients and do not require any warning to be given I am of opinion that the authorities in the position of the defendants are free from responsibility. I am impressed by the fact that, as far as we can judge from the evidence, no such warning is given in any of the hundreds of maternity homes and hospitals in which maternity cases are admitted throughout the country. It would seem that the medical authorities in charge of such institutions have taken the view that in certain circumstances the institutions should be closed, and that it is not wise to keep them open while indicating to the would-be patients that they are running risks, the nature of which they and their husbands are, of course, quite unable to estimate. To me there seems sound sense in such a view, for reasons I have already given. If it is urged that the warning should be given to the medical adviser of the patient (assuming that he is accessible) I think there is great weight in the retort that if he is not disposed to trust the maternity home or the hospital and those who manage it, it is he who should make his own inquiries.

Turning now to the authorities on the question of the obligation, if any, undertaken by the defendants towards the plaintiff, I am of opinion that these authorities bind us to hold that the contract of the defendants imposes on them only the limited duty which I have above defined. The first case I think it necessary to cite is a decision of the Court of Appeal in *Hall* v. *Lees*. (1) The defendants were an association who provided qualified nurses to attend on the sick in the neighbourhood of Oldham. They paid salaries to such nurses and made charges for their services to persons on whose application the nurses were supplied. The female plaintiff, through the negligence of the nurses, sustained an injury, and she and her husband brought an action against the defendant association for damages in respect of that injury. It was held by the Court of Appeal that what the association undertook to do upon the true construction of the rules of the association and other documents was merely to find and supply nurses in selecting whom they had employed

(1) [1904] 2 K. B. 602.

all reasonable care and skill in order to ensure their being competent and efficient. Great reliance was placed on the fact that the nurses when supplied were not subject to the orders of the association who supplied them and who actually paid their wages but were subject to the orders of the medical man employed by the plaintiffs. The next material case is *Evans* v. *Liverpool Corporation.* (1) That was a case where the defendants, a local authority in the same position as the defendants here, acted under the provisions of the Public Health Act, 1875, and provided for the use of the inhabitants of the district a hospital for the reception of persons suffering from infectious diseases. A visiting physician was appointed to the hospital and acted under the general directions of the Hospital Committee. A son of the plaintiff who had been treated in the hospital for an attack of scarlet fever was ultimately discharged by the visiting physician whilst still in an infectious condition. This was held by the jury to amount to a want of reasonable skill and care on his part, and they also found that there was an undertaking by the defendants with the plaintiff that their visiting physician should act with reasonable care and skill in and about the discharge of the boy from the hospital. Three other children of the plaintiff having contracted the disease on the return of the boy to his home, the plaintiff sued the defendants to recover the expense to which he had been put in regard to their illness. It will be noted that the alleged negligence was connected with the discharge of a patient from the hospital, not with the treatment of the boy whilst in the hospital. It was held by Walton J., in a judgment which has been approved in the Court of Appeal, that the defendants did not undertake anything more than that the patients in their hospital should have competent medical advice and assistance, and, accordingly, that even if the doctor had made a negligent mistake the defendants were not liable for its consequences. It is true that in that case the doctor was not the servant of the defendants for the purposes of discharging the child, but an officer who was paid an annual salary and in certain matters had to obey the directions of the committee appointed by the defendants; but the learned judge held that it was for the doctor to decide whether or not a particular patient was free from infection when discharged and to exercise his judgment, skill, and knowledge in determining whether the patient could safely be discharged or not. The decision of Walton J. in that case seems to me to justify the view that the defendants are free from liability in the present case.

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(1) [1906] 1 K. B. 160.

The next case to be considered is *Hillyer* v. *St. Bartholomew's Hospital Governors.* (1) The headnote correctly states what was decided—namely, that the only duty undertaken by the Governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The relationship of master and servant does not exist between the Governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the Governors, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities. The Court of Appeal agreed with Walton J.'s decision in *Evans* v. *Liverpool Corporation* (2), and they also approved an American decision in *Glavin* v. *Rhode Island Hospital* (3), a case very similar to the case then before the Court. The operating surgeon was clearly in no sense a servant of the Governors of the hospital though they had the power to dismiss him from his position. The nurses and certain other attendants were assumed to be the servants of the defendants, but although they were such servants for general purposes it was held that they were not so for the purposes of operations and examinations by the medical officers. To my mind it is clear that the same principle applies to the whole course of treatment given in such a hospital, including the discharge of the patient when supposed to be sufficiently well to justify his leaving. Nor, as I have already said, can I see how the question of admission to the hospital or the duty, if any, of giving a warning that an infectious case has recently been treated in the hospital can be said to be a matter for which the authorities providing the hospital or a home are personally responsible. The recent decision of the Privy Council in *Vancouver General Hospital* v. *McDaniel* (1) seems to me to support the same view, though it is not directly in point owing to the fact that a defence raised by the defendants on the ground that the technique of which complaint was made (one which caused the plaintiff to contract the disease of small-pox) was adopted by the defendants on competent medical advice was not definitely established. The judgment of the Board seems clearly to show that if the proposition had been established the defendants would have been entitled to succeed on that ground alone.

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(1) [1909] 2 K. B. 820.
(2) [1906] 1 K. B. 160.
(3) (1879) 34 Am. Rep. 675.

My conclusions, therefore, are that the matron was not under a duty to warn the plaintiff in the circumstances of the case that Mrs. Franklin had had puerperal fever in the Home, but had left some eight days previously and that precautions had been taken as above mentioned, and, further, I think the matron was, in the circumstances, bound to act under the directions of Dr. Stott, who had not closed the Home to incoming patients and had not directed any warning to be given. If I am wrong in this view I still think that if she decided wrongly in the circumstances it was nothing more than an error of judgment for which the defendants were not responsible.

Finally, I am of opinion that the case is one in which the duty of the defendants was the limited duty of providing duly qualified nurses and proper rooms and appliances for mothers about to bear children and that the defendants are not, in the circumstances, liable for the negligence of these persons or any of them even if such negligence were established in the circumstances of the case.

I feel compelled to add that even if it was negligent in the circumstances to admit the plaintiff or to admit her without warning, I entertain the greatest doubt whether there was evidence before the jury from which they could properly

(1) [1934] W. N. 171.

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find that the plaintiff contracted puerperal fever directly or indirectly from Mrs. Franklin; and unless this was so I have a difficulty in seeing how the damage can be said to flow from the alleged want of care now under consideration —namely, a lack of warning as regards Mrs. Franklin. No damage can flow from neglect to give a useless or unnecessary warning. It is, I think, accepted, according to the evidence, that the disease is due to an organism described as a hæmolytic streptococcus which seems to be the same as the organism which causes scarlet fever. The period of incubation is agreed to be twenty-four to forty-eight hours. The admitted fact that Mrs. Franklin had left the Home eight days before the plaintiff entered it, together with the fact that the four cases of sepsis which developed on July 16 developed at practically the same time, seem to me to point to the circumstance that the outbreak on the 16th was not due to contagion from Mrs. Franklin, but to some other source, such as the existence of some carrier in the Home or to its introduction from outside, for instance, to its introduction by Mrs. Fleming. I place of course no reliance on my own view, but it is significant that no witness on behalf of the plaintiff pledged his opinion that the disease was contracted indirectly from Mrs. Franklin, whilst on the other hand a number of witnesses on the part of the defendants stated that in their opinion the plaintiff's illness had nothing to do with Mrs. Franklin. I will cite only two of the witnesses in question. The first, Dr. Victor Douglas Allison, a highly skilled Doctor of Medicine on the staff of the Pathological Laboratory of the Ministry of Health, who deposed that so far as his expert opinion went it was not possible to say that there was any connection between Mrs. Franklin and Mrs. Marshall. The other witness I should like to refer to is Dr. William Henry Francis Oxley, a Fellow of the College of Obstetricians and Gynæcologists, a man of great experience and of distinguished reputation, who stated with full knowledge of the evidence that in his opinion there was no connection between Mrs. Franklin's case and Mrs. Marshall's case. Evidence to the same effect was given by Lieut.-Colonel Stephen and others. In my opinion in a case where the causation of damage depends on infection from a particular source there should be some expert evidence of such infection to set against the very strong expert evidence on the part of the defendants; but there was none. I must say a word on the question of swabs. The jury, as above stated, have amongst other things found that there was a breach of duty in the administration of the Home from July 4 to July 20, in that swabs were not taken from the whole of the staff immediately on the report of Mrs. Franklin's case. Swabs, it should be observed, would be taken for the purpose of ascertaining whether any of the staff were possible carriers of the disease, and it may be admitted at once that the immediate taking of such swabs might have been a useful precaution. Indeed, since the outbreak occurred there have been some further regulations published by the Ministry of Health of April 13, 1934, recommending the taking of swabs in such a case. No such regulations were in force in July, 1933, and the mere absence of a precaution which later experience has suggested as a wise one could not be held to constitute negligence at the earlier date. It may be noted that there is nothing about the precaution of taking swabs in the particulars of negligence; moreover, for the reasons now to be stated, I think there was no evidence to prove that if swabs had been taken they would have disclosed the fact that one of the staff of the hospital was a carrier of the organisms leading to puerperal sepsis. It should be remembered that upon the report being received the matron had at once directed that the whole staff, who had had disinfectant baths on the previous night, should gargle their throats with disinfectant, and she so reported to Dr. Stott, who was satisfied. Further, Nurse Siddle, who had delivered Mrs. Franklin, was put off duty for forty-eight hours. She had, in fact, been disinfected before, and she did not come back to duty till the 8th. Moreover, after the outbreak on July 15 swabs were taken from the noses and the throats of the nursing staff, and forwarded to the Ministry of Health, and they were there examined. They were all negative except that there was a slight suspicion about Nurse Siddle's swab, which was thereupon incubated for a further twenty-four hours. There was still a slight suspicion in that particular case and there was a further culture. The final result was that all the swabs taken from the staff on July 19, 1933, and forwarded to the Ministry of Health, were negative, that is to say, that no organism that could be identified as a hæmolytic streptococcus was found in any of them. In these circumstances I do not see that there was any evidence at all from which the jury could form the conclusion that if swabs had been taken on July 5 from the staff it would have been established that one of the nursing staff was a carrier of the disease. Nurse Siddle, whose swab was thought in the first case to require further examination, had not in fact assisted in the delivery of the plaintiff. She had had some contact with her after her delivery and had been in contact with Mrs. Franklin; but as I have already stated, she was disinfected on July 4 and 5, after Mrs. Franklin was removed, including having lysol baths, gargling, and a complete change of clothing. I conclude this matter of the swabs by remarking that there was no evidence to show that the technique of the Home with regard to the taking of swabs according to the expert opinion at the time was in any way defective, and by adding that in my opinion that technique was a matter for Dr. Stott and Dr. Campbell. Even if they were wrong in their view I am of opinion, for the reasons already given, that the defendants are not liable for their error.

I will add that the only circumstance in the case in which all the experts agree is that there is the greatest difference of opinion among gynæcologists on the subject of the prevention of puerperal sepsis, and very different views are held as to how these distressing cases should be avoided. Dr. Oxley's experience is founded upon the fact that he attends one of the larger hospitals in London in which there are fifty-six beds and roughly 2000 maternity patients a year, and in this hospital there is an extraordinarily low death rate. He expressed the opinion that on the known facts the admission of the plaintiff at the time when she was admitted was perfectly safe, that the disinfections which took place on July 5, assuming they were properly carried out, were on perfectly safe lines, that the taking of the swabs was a very wise thing to do, but that having regard to the results of the swabs that were taken a few days later, his opinion was that the failure to take them had nothing to do with the case. He gave a most striking answer as regards the practice and results in his own hospital. He stated that they take no precautions against carriers at all and, in fact, they have carriers constantly working in the hospital, and yet it has the lowest death rate from sepsis which has ever been published in the world, and he expressed a doubt whether the Ministry of Health and many pathologists and bacteriologists have not been, in his phrase, a little bit too enthusiastic over this new proposition that carriers are a very great source of infection. He added that the theory was fascinating, but that it does not work out in practice. The jury, of course, were not bound to accept this view of Dr. Oxley's, and were perfectly entitled, if they pleased, to accept the view of the less experienced medical men who were called on behalf of the plaintiff; but I refer to his evidence as an illustration of the fact that in this matter, as in so many others, the doctors differ, and in the presence of this undoubted honest difference of opinion it is not open in my opinion to a jury to hold that it is negligent to accept one view rather than the other.

It was also sought to justify the verdict of the jury on the well known principle applicable to invitees. The leading case is that of *Indermaur* v. *Dames*. (1) The law imposes upon the occupier of premises towards an invitee a duty to use care to make the premises reasonably safe, or, if there is any hidden danger known to the occupier, to give the invitee due warning of its existence. It is not necessary in this case to discuss the question as to the exact nature of the duty which has recently been discussed in this Court in *Hillen* v. *I. C. I.* (*Alkali*), *Ld.* (2), for the case was not fought at the trial on those lines. The question whether the defendants were occupiers of the

(1) (1866) L. R. 1 C. P. 274.

(2) [1934] 1 K. B. 455.

Maternity Home in any particular sense was not considered at the trial, nor did the jury give any finding on the question whether the matron or any other person in charge of the Home thought when admitting the plaintiff as a patient that there was any hidden danger involved in so doing. I will add that in my opinion there was no evidence on which the jury could come to such a conclusion. It was not suggested that the matron acted otherwise than in a genuine belief, which was also entertained by Dr. Stott and Dr. Campbell, that the precautions of disinfection taken at the Home after Mrs. Franklin left on July 4 had removed all real danger from that source by July 12. Moreover, even if there was a hidden danger known to the matron, I am of opinion that she was bound in such a matter to act as Dr. Stott directed, and since he was not a servant of the defendants I am unable to see how on these lines the defendants can be under a liability.

In view of the above my judgment would be for allowing the appeal and dismissing the action, but as my brethren on some of the crucial points involved have come to a contrary conclusion, the result will be otherwise.

ROCHE L.J. I agree with Greer L.J. that the plaintiff is entitled to hold the judgment she obtained at the trial, and that this appeal should be dismissed. The facts have been so fully set out and discussed by both the Lords Justices who have given judgment that it is quite unnecessary that I should repeat them. I agree so entirely with the reasoning of Greer L.J. that I should be content merely to concur in his judgment, but having regard to the full and able argument of the case for the appellants, and to the opinion of Maugham L.J. that the defendants are entitled to judgment, I think it right to make some additional observations.

On the argument of the appeal, counsel for the plaintiff, without making any admission as to other matters, rested his claim to judgment upon the answers of the jury to questions 6 and 7 left to them. I think he was right, and I agree with the result of both the judgments just delivered as to the other questions and answers. On the facts as to the question of the contract for a private room, and on the law as to the position of the medical officers, the plaintiff was not in my opinion entitled to judgment by reason of the answers of the jury to those questions.

As to the crucial matter of information or warning, I attach importance to the following considerations as well as to those more specifically enumerated by Greer L.J. The Maternity Home in question was of modest dimensions, a house, judging from the plan and evidence, of some ten or eleven rooms and the necessary offices. Comparison therefore with other much larger institutions referred to in the evidence, and with the practice of such institutions, is to my mind not really of assistance or utility. The history of this outbreak and its course in this Home after the plaintiff was infected is not material to the case, save as showing that effective isolation was not possible. A much closer analogy to this case is, I think, furnished by an ordinary private dwelling-house than by a large maternity hospital. I should therefore be surprised if the jury did not consider, and I think they were entitled to consider, what is the normal practice of ordinary people using common sense and common prudence towards invitees or guests, paying or otherwise, who propose to enter and stay in their homes when a case or cases of infectious disease have recently occurred in those homes. It seems to me that the duty of the defendants, acting through the matron, does not differ from the position of an ordinary householder in this matter, and in particular in respect of a duty to inform or warn a proposed entrant, or his or her representative, of a danger which was unknown to the entrant, but which was, or ought to have been known to the matron.

As to the existence of the danger, it was admitted by the defendants that the plaintiff contracted puerperal fever in the Home. It was sought to be argued that this admission merely meant that she developed the disease there, and was consistent with her having brought the infection with her. I think the plain meaning of the admission is, to use a popular

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expression, that the plaintiff caught the disease in the Home. But apart from the admission, the evidence for the jury was in my opinion amply sufficient to justify their answer to question 7.

There is, of course, no doubt that the danger was unknown to the plaintiff, her husband and to Dr. Thompson, her medical attendant. The crucial question is, Was it known, or ought it to have been known, to the matron? The facts as to Mrs. Franklin need not be repeated, but it is to be noted that the matron knew from inquiry of the General Hospital that it was a case, and a very acute case, of puerperal fever and that the patient had died of it before July 12. Then came Mrs. Fleming's case. This was notified by Dr. Montgomery on July 12 before the plaintiff proposed to enter the Home as a case of puerperal pyrexia, a condition notifiable under the same Order as that which makes puerperal fever notifiable. It is sufficient to say that puerperal pyrexia is a degree of fever arising during the period of maternity which may be due to an infection identical with that which results in puerperal fever, and that it may pass into puerperal fever. I confess that I find it astonishing that Mrs. Fleming's doctor, Dr. Montgomery, was not told about the antecedent and grave case of puerperal fever. It was suggested in the course of the trial that to tell him would have embarrassed him in his diagnosis and treatment, a suggestion which, having regard to the importance of history in such circumstances, might, I think, well be regarded as almost absurd.

It is, of course, true that not to tell Mrs. Fleming or her doctor before admission, or her doctor when she became ill, of the recent experience in the Home was no breach of duty to the plaintiff; but the materiality of these circumstances as to Mrs. Fleming's case nevertheless seems to me to be unquestionable. Dr. Stott, in his illuminating report, dated July 20 " On the outbreak of puerperal fever in the Home " treats, and I think rightly treats, Mrs. Fleming's as the second of the seven cases of puerperal fever. It was also admitted by Mr. Cave in his argument before us that swabs from Mrs. Fleming showed the presence of the noxious organisms, hæmolytic streptococci of the Glover type, identified in this case as the cause of the puerperal fever. All this was not known on July 12, but enough was known to throw the gravest doubts on the efficacy of the disinfection of rooms and persons which was being relied upon as sufficient. I cannot bring myself to doubt that communication to Dr. Montgomery ought to have been made, and that had it been made more suspicion would have been aroused, and more investigation would have followed. At all events, the defendants seem to me to be precluded by the matron's omission to inform Dr. Montgomery of most material and recent history from relying on the fact that Dr. Montgomery did not diagnose puerperal fever. In my opinion, the matron was, by reason of the happenings to Mrs. Fleming, under a greater and not under a less obligation to inform the plaintiff's husband or doctor, or both, of the antecedent case of Mrs. Franklin, which was a proved case of puerperal fever of the gravest character. I must not be taken to mean that the matron was necessarily bound to give the names of any patients affected, or to inform the plaintiff's representatives of more than the bare and relevant facts affecting her choice of entrance into the house. The truth seems, unfortunately, to be that, judging by an admission or statement made by the defendants through counsel on the hearing of a summons for interrogatories, the defendants appear in effect to claim a right to tell nobody of such matters. The admission is as follows: "That no person responsible for the Home informed the plaintiff or her husband that there had been a case of puerperal fever, and that they would not have done so if there had been such a case."

So far as this claim rests on any matter of law, I have already expressed my opinion that it is unfounded. So far as it rests on matters of fact as to what knowledge the matron had or ought to have had, and what she should have done in the circumstances, there was in my opinion evidence upon which the jury were properly entitled to answer the question now under consideration in the sense in which they did answer it.

There is one further matter I should refer to in connection with this question of information or warning. The fact that the defendants claim in the sense I have above indicated to be free not to give information or warn appears to me, with the greatest respect to the opinion of Maugham L.J., to render it less necessary than it otherwise would be to consider or decide as to the time and manner and proper recipient of information, and as to the difficulties which attended or might attend its giving or its receipt. There was not, so far as I remember, any evidence called to our attention that the matron or any one else considered or was deterred by any such difficulties. I confess, however, that when I consider what in comparable circumstances would be expected, and would I think generally be done by private hosts and by those responsible for private nursing homes, and even by agisters and livery-stable keepers in the case of infectious animal disorders, I cannot regard the difficulties as serious, still less as insuperable. Speaking for myself, I should think that communication to the doctor or husband or both was the proper course, and that any time would do—the earlier the better—before the admission. With regard to the difficulty the plaintiff would have been in, this, I should imagine, could have been overcome by the adoption of the method employed by countless women in all stations of life—namely, confinement in her own home and attendance by a doctor and a private or district nurse, or in an extreme emergency by an experienced friend or neighbour. One or other of these attendants would, I doubt not, have been available in this not thinly populated neighbourhood. At all events, though a maternity home is a comfort and a means of greater safety in many, perhaps in most circumstances, yet better the plaintiff in her own home and with such attendants as I have indicated than in this nursing home under the prevailing conditions.

Before leaving this—the sixth—question and answer, I have one further observation to make. I hope I have made it clear that I regard the obligation in proper circumstances to give information or warning as the direct responsibility of the defendants and their servant, the matron, whom they put in

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charge of the Home. Doctors may supply some of the material on which those who keep or manage such a home have to decide what and whom to tell, but the responsibility cannot, in my judgment, be shifted to any doctor. It is not a clinical matter, but is part and parcel of the keeping and management of a home, and is bound up in a case such as this with the making and implementing of the contract between the plaintiff and the defendants. This view is, I think, borne out by another admission made by the defendants on the hearing of the summons for interrogatories which read as follows: " That the matron was acting under the authority of the defendants in making agreements of the kind referred to in para. 2 of the statement of claim." The same principle, I think, applies to the contract pleaded in para. 3 of the defence, under which the defendants contend, and rightly contend, that the plaintiff entered their Home.

As to the answer to the seventh question two points seem to arise. The first is: If the information or warning had been given, would the plaintiff have entered the Home? The plaintiff and her husband said " No," and it is clear that as it was they hesitated about entrance, having regard to the necessity of dispensing with a private room. As to the doctor's attitude: Dr. Thompson, who seems to have given his evidence both sensibly and fairly, I think can really have left the jury in no doubt that his decision or advice would have been in the same sense, that is to say against entrance, though of course something would have depended on inquiries he made after receiving the material information. This evidence for the plaintiff the jury must have accepted, and I think they were entitled to act upon it. The other point is one of causation. It was argued for the appellants that the plaintiff failed to show that she contracted the disease either from Mrs. Franklin or in the Home. The plaintiff never rested her case on an allegation that the disease could be traced to her direct from Mrs. Franklin, nor, in my judgment, was any such allegation or proof necessary. I have already dealt with the admission and evidence upon the point whether the plaintiff contracted the disease in the Home. Apart from the admission, the probabilities and the evidence seem to me to be amply sufficient to warrant the jury's answer to the seventh question.

No question now arises as to the amount of damages.

I am therefore of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Taylor, Jelf & Co., for Eric W. Scorer, Lincoln.*

Solicitors for respondent: *Maude & Tunnicliffe, for James Young, Grimsby.*

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Jan. 18, 21, 22.

NICHOLSON *v.* SOUTHERN RAILWAY COMPANY AND SUTTON AND CHEAM URBAN DISTRICT COUNCIL.

[1934. N. No. 708.]

Negligence—Highway—Reconstruction—Unfenced land adjoining highway —Level of adjoining land lower than edge of new pavement— Dangerous drop—Injury to pedestrian—Claim for damages—Owner of adjoining land not liable.

Where a danger has been created on a highway by something done on the highway and not by anything done on the adjoining land, the owner of the adjoining land is not bound to make any alteration on or to his land to do away with that danger.

Thus, where, in consequence of a highway having been made up by a highway authority, the level of the adjoining land, which is unfenced, has been lowered so as to cause a dangerous drop from the edge or kerb of the reconstructed highway, and a pedestrian slips down from the highway on to the adjoining land and is thereby injured, the owner of the adjoining land is not liable, but the highway authority is.

ACTION tried by Branson J. without a jury.

The plaintiff, while walking along Station Road, Cheam, Surrey, at night, on December 16, 1933, fell from the highway on to adjoining land, which was unfenced, and was injured. On May 1, 1934, the plaintiff issued a writ against the defendants, the Southern Railway Company and the

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Sutton and Cheam Urban District Council, claiming damages for personal injuries. She alleged that the first defendants, the Southern Railway Company, were the owners of the land adjoining the highway, and that the second defendants, the Sutton and Cheam Urban District Council, as the highway authority, had made up the road with the kerbing, and that thereafter the railway company or the defendant council, or both, negligently caused the level of the unfenced land of the railway company to be and remain about six inches lower than the level of the edge or kerb of the highway. She said that by reason of this drop she fell down the slope and broke her leg in two places.

The railway company denied that they were the owners of the land adjoining the highway at the point where the accident happened. Alternatively, they pleaded that if they were, they were still not liable to the plaintiff, because they had done nothing, and nothing had been done on their land, to create a nuisance by the highway. They denied that it was their duty to take care to see that there was fencing or lighting or that warning was given to persons using the highway, or that they were responsible for the alleged or any danger or nuisance.

The defendant council denied liability, and pleaded that any injuries, loss or damage sustained by the plaintiff were caused by the Southern Railway Company. In the alternative, they said that the plaintiff was guilty of contributory negligence.

The facts and arguments are stated in the judgment.

R. Fortune and *W. G. Wingate* for the plaintiff.

Hon. S. O. Henn Collins K.C. and *A. T. Denning* for the Southern Railway Company.

C. Doughty K.C. and *N. R. Fox-Andrews* for the Sutton and Cheam Urban District Council.

BRANSON J. This is an action in which the plaintiff, Miss Florence Mary Jane Nicholson, sues two defendants, the Southern Railway Company and the Sutton and Cheam Urban District Council, for damages for certain injuries which she sustained while walking along a road called Station Road, formerly Burdon Lane, at Cheam.

According to the evidence, which on this point is undisputed, this particular bit of road consists of a pavement running outside and past a public-house called the "Railway Hotel," and the pavement is a triangular piece, fairly wide, just by the public-house and running away to nothing where a privet hedge comes to meet the line of the outer kerb of the pavement. At that point there were at the time of the accident three steps down to a steep path leading from the road down into a disused chalk pit. Further on there was a kerb standing about 5½ inches above the soil on the path side of it and gradually coming nearer and nearer to the level of that soil, until the levels became the same. The plaintiff was walking past the hotel, towards the point where the pavement narrowed away to nothing. She then stepped off the pavement into the road and, assuming that the pavement continued on the other side of the privet bush which stood at the end of the triangular bit of pavement, she stepped forward, fell down the slope and broke her leg. She also suffered from severe bruising and shock. She was in a nursing home for some days, and had to have attention in her own house, which was given to her by a friend of hers to save her getting a nurse, and she had a variety of expenses to incur as well as a considerable amount of pain to endure. As the result she claims special damages. These amount to 230*l.* I think that, taking into consideration those damages and the pain and suffering and disability to which she has been put, the proper amount of compensation which she ought to recover from whosoever is liable is 500*l.*

The question is whether she can recover from either or both of these defendants. The first defendants, the railway company, say that they are not the owners of the land adjoining the highway at the point where the accident happened, and they say, secondly, if they are, that they are still not liable to the plaintiff because they have done nothing, and nothing has been done on their land to create a nuisance by the highway, and consequently that, whatever may be the rights of the plaintiff against the urban district council, she has none against them (the Southern Railway Company).

The urban district council contend that the plaintiff is not entitled to recover against them because of her contributory negligence, and they say that she ought to have seen that there was no pavement, and also that there was a slope down which she might fall, and they say, thirdly, that even if they are responsible, they are not solely responsible, but that the railway company are also responsible, because that company have allowed their land adjoining the highway at this point to be in a condition which caused it to be a nuisance.

First of all, with regard to the defence of contributory negligence, I think that fails. Here was a place in which the plaintiff was invited by the presence of a properly made up pavement to walk on that side of the road. It appears from the photographs and plans that to any one coming along the road there would be presented the vista of a pavement continuing on the other side of this gap which went down to the pit, and which was hidden by the privet hedge and the big privet bush, which was at the point where the triangular piece terminated. It seems to me that a person might well consider in circumstances of this sort that it would be perfectly safe, having stepped out in the road, to go round this bush, to ease in to the left expecting to find a continuance of the pavement on that side. Therefore the defence of contributory negligence fails, and it only remains to deal with the other defences raised.

I do not see that there is really any other defence for the urban district council. The history of the matter, so far as they are concerned, is this: Before 1930 this was a small country road with a tar-sprayed surface; the place where the pavement now is in the angle between the hedge and the hotel was rough gravel; the path down to the pit was rough gravel, and I have no doubt that the surface of the road fell away and joined the path which led down to the pit in a gradual slope without any kind of sudden drop, except perhaps where the steps are now. It is plain, I think, with regard to the steps that what is now the top step is the concrete kerb put in by the urban district council. The next step, which is of a similar concrete, was I think also either put in or replaced by them at the time when they made up the road and put in the kerb. The bottom step is obviously much older, and I think existed before 1930, though to what extent it was always apparent I am not clear. Some of the plans which have been produced to me show steps existing, others equally detailed do not show them. I have no doubt that one of these steps was there and at some time it was visible though it may be that at other times it was not. However, that does not appear to me to be material, because until the work was done by the urban district council in 1930 I am satisfied that there was nothing which constituted a danger or a nuisance to the highway at this point. The highway joined the path down into the pit by an ordinary reasonable slope. I think that must have been so, because this was the only exit from the pit, and there is evidence that it was used by wheeled vehicles down, at all events, to quite recent times—just before 1930.

In 1930 the urban district council were minded to turn this little country lane into a big thoroughfare. The road was widened to a very large extent and the level of it was raised by some 5 or 6 inches at about the point with which this case deals. The result was that the edge of the raised road where the road joins the path which went down into the pit stood up some 5½ inches. By doing that work the local authority converted what was a perfectly safe bit of road into a road which was dangerous. This drop, coming as it did just behind this hedge, and at the apex of the pavement, made, when that pavement was put in, what appears to me to be a regular trap for pedestrians using that side of the road. I think it is not uninteresting to observe that down to 1930 there seems to have been no danger or difficulty at all. At that time there was a footpath on the other side of the Burdon Lane, or Station Road, and no temptation for pedestrians to walk upon the pit side of the road. After the pavement was erected accidents began to occur, people did just what the plaintiff in this case did.

Pedestrians used the west side of the road past the public-house, expecting to find the condition of things which existed before the pavement came to a point to continue on the other side, but they found instead this sharp declivity, which, though not more than 5 or 6 inches, was still sufficient to cause an unsuspecting person to fall. To make up a road like that without protection, coupling with it the invitation presented by this piece of triangular pavement, was a misfeasance which gives a right to the plaintiff who has suffered injury by reason of it to recover damages from the urban district council.

That leaves the position of the railway company to be dealt with. The case against the railway company may be summed up in the following way. It is said that they are the occupiers or owners of the land right up to the highway at this point, and it is said that there is a common law obligation upon owners or occupiers of land adjoining a highway to prevent their land from ever becoming a nuisance, and therefore as soon as the urban district council had raised the level of the highway so as to make a dangerous drop between the highway and the railway company's land, it became the common law duty of the railway company either to fence it, or to build up their land so that this dangerous drop should cease to be. It seems to me that that is putting a new and intolerable burden upon the occupiers of land adjoining highways. No doubt the common law is very strict to ensure that land adjoining a highway should never be so used or allowed to get into such a condition as to make it a nuisance to the highway. It is not necessary to refer in detail to a number of the well known cases which have been cited in support of that proposition. It is enough to refer to *Barnes* v. *Ward.* (1) Wherever one looks to see what the obligation of an adjoining owner is in respect of a highway one finds that his obligation is not to allow his land to be used in such a way as to constitute a nuisance to the highway, or to those using the highway. But what is contended for here is something entirely different. It is said that when something has been done, not upon the adjoining land at all, but upon

(1) (1850) 9 C. B. 392.

a highway, which makes that highway dangerous, some obligation is put on the occupier of the adjoining land to alter his land, to do away with the danger which has not been created by anything done on his land at all, but by something which has been done on the highway. That is a completely new proposition of law so far as I am concerned, and one which does not seem to me to be supported by or deducible from any of the authorities which have been cited. On the contrary, it seems to me that there are expressions in the case of *Cooper* v. *Walker* (1) which really tend in the opposite direction. It is true they are only dicta, but Blackburn J., in delivering the judgment of the Court, said (2): "If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so if the consequence were that he was bound to fill up or fence off his canal."

I am, of course, conscious that that case is not dealing with the precise point with which I have to deal, but I think it is a fortiori a hardship if, as is suggested here, the authorities concerned with the maintenance of the highway can, by altering the highway in such a way as to constitute it

(1) (1862) 2 B. & S. 770, 773.

(2) Ibid. 780.

dangerous, throw on the owner or occupier of adjoining land an obligation to make it safe. All the cases which have been cited, or of which I know, relating to the obligations of the occupier of land to prevent a nuisance to a highway which adjoins it from arising on that land, turn on something which has been done on the land. Instances are *Attorney-General* v. *Tod Heatley* (1); *Robbins* v. *Jones* (2), and a number of other cases. In my opinion, to push that principle to the extent of saying that, if the highway is made unsafe by those who have the charge of it, adjoining owners must take steps to do away with the danger by works done on their own land would be, as I began by saying, to put a new and intolerable burden on the occupiers of land adjoining highways.

The result of it is that, in my view, the plaintiff is entitled to recover judgment against the Sutton and Cheam Urban District Council for 500*l.*, and that her action against the Southern Railway Company fails.

It has been suggested that it may be material to decide whether or not the railway company are the owners of the adjoining land at the point where the accident took place. It may be well that I should express my opinion on it, though it is not material to my judgment. It is quite clear that the land in question was never conveyed to the railway company. On the other hand, they have used it, and they have asserted an occupier's title over the land on which the plaintiff fell when she fell off the edge of the kerb. I do not think it is material to my judgment, because I hold that even if they were the owners of the land at the time of the accident they are not responsible.

Judgment for the Southern Railway Company.
Judgment for the plaintiff against the urban district council.

Solicitor for the plaintiff: *H. T. Nicholson.*
Solicitor for the Southern Railway Company: *W. Bishop.*
Solicitors for the urban district council: *James Turner & Son.*

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(1) [1897] 1 Ch. 560.
(2) (1863) 15 C. B. (N. S.) 221.

T. W. M.

C. A.
1935
March 5.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* NATIONAL PROVINCIAL BANK LIMITED.

Landlord and Tenant—Agricultural Holdings—Charge by Tenant to Bank of " other agricultural assets "—" Tenant's " Right to Compensation—Notice by Tenant to quit Holding—Termination of Tenancy—Claim by Bank against Landlords to Sums due from Landlords to Tenant—Right of Bank to Arbitration as " Tenant "—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 16, 57—*Agricultural Credits Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 43), *s.* 5.

By s. 16, sub-s. 1, of the Agricultural Holdings Act, 1923: " Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . . or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding . . . . shall be determined . . . . by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

By s. 57, sub-s. 1: " In this Act, unless the context otherwise requires, ... ' Tenant ' means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant, or other person deriving title from a tenant."

By s. 5, sub-s. 1, of the Agricultural Credits Act, 1928: " It shall be lawful for a farmer as defined by this Act by instrument in writing to create in favour of a bank as so defined a charge (hereinafter referred to as an agricultural charge) on all or any of the farming stock and other agricultural assets belonging to him as security for sums advanced or to be advanced to him or paid or to be paid on his behalf under any guarantee by the bank and interest, commission and charges thereon."

By sub-s. 7: " For the purposes of this Part of this Act— . . . . ' Other agricultural assets ' means a tenant's right to compensation under the Agricultural Holdings Act, 1923, for improvements, damage by game, disturbance or otherwise, and any other tenant right."

The tenant of an agricultural holding by a charge under the Agricultural Credits Act, 1928, dated April 29, 1933, charged in favour of a bank his farming stock and other agricultural assets as defined in s. 5, sub-s. 7, of the Act of 1928. The charge was duly registered and became a fixed charge on October 14, 1933. The tenant quitted the holding on October 11, 1933, and subsequently became bankrupt. The bank made a claim to the whole of the sums due from the landlords to the tenant at the termination of the tenancy free from deductions. The landlords disputed the right of the bank to make the claim, and in any event claimed to deduct from any sums to which the tenant was entitled at his outgoing all sums due from him in respect of arrears of rent and dilapidations. An arbitrator was appointed by both parties under the provisions of the Agricultural Holdings Act, 1923. At the arbitration the landlords contended that the bank were not the tenants of the holding within the definition of "tenant" in s. 57, sub-s. 1, of the Act of 1923, and that there could be no arbitration under that Act between the landlords and the bank. The arbitrator stated a special case, and a county court judge held that the bank never were tenants of the holding within the meaning of the Agricultural Holdings Act, 1923; that the charge, on which the arbitration was based, did not vest the land or the benefit of the contract of tenancy in the bank, and that s. 16, sub-s. 1, of the Act of 1923 only provided for an arbitration between landlord and tenant, and therefore there was no valid submission to arbitration. On an appeal by the bank:—

Held, that the definition of "tenant" in s. 57, sub-s. 1, of the Agricultural Holdings Act, 1923, did not include a mere assign of "farming stock and other agricultural assets" or a person who was the assign of a right to compensation under the Agricultural Holdings Act, 1923, and therefore the bank were not entitled to proceed to arbitration with the landlords.

APPEAL from the decision of a county court judge on a case stated by an arbitrator appointed under s. 16 of the Agricultural Holdings Act, 1923, in an arbitration between the Ecclesiastical Commissioners for England, landlords, and the National Provincial Bank, Ld., claiming as assignees of Bryan Nichols, tenant.

At the hearing of the arbitration the following facts were proved and admitted:

1. The Ecclesiastical Commissioners for England (hereinafter called "the landlords") were at all material times the landlords of an agricultural holding known as the Manor Farm, in the parishes of Leighton Bromswold and Catworth, in the County of Huntingdon. The said holding was let by the landlords to one Bryan Nichols (hereinafter called "the tenant") from October 11, 1926, from year to year at a rent of 480*l.* per annum by a tenancy agreement. He was, however, only in occupation of 368 a. 3 r. 12 p. in the parishes of Leighton Bromswold and Catworth at the material time of the arbitration. On October 7, 1932, the tenant served upon

the landlords a notice to quit the said holding at Michaelmas, 1933, and in pursuance of the said notice quitted the same at Michaelmas (October 11), 1933.

2. By a charge under the Agricultural Credits Act, 1928, dated April 29, 1933, the tenant charged in favour of the National Provincial Bank, Ld. (hereinafter called "the bank") his farming stock and other agricultural assets as defined in s. 5, sub-s. 7, of the Agricultural Credits Act, 1928. The said charge was duly registered on May 5, 1933, and became a fixed charge on October 14, 1933. The bank by virtue of its powers under the said charge appointed a receiver of the assets comprised in the said charge.

3. On December 5, 1933, a receiving order was made against the tenant, and he was duly adjudicated bankrupt and a trustee in bankruptcy was appointed. Neither the tenant nor the trustee in bankruptcy had made any claim upon the landlords arising out of the termination of the tenant's tenancy.

4. Within two months from the termination of the tenancy the bank made a claim to the whole of the sums due from the landlords to the tenant at the termination of the tenancy free from deductions. The landlords disputed the right of the bank to make the said claim and, in any event, claimed to deduct from any sums to which the tenant was entitled at his outgoing all sums due from him (*a*) in respect of arrears of rent, and (*b*) in respect of dilapidations for which the tenant was liable under his lease. Formal statutory claims were made and their sufficiency was not disputed.

5. P. C. Gambell, chartered surveyor, of Newport Pagnell, in the County of Buckingham, was appointed by both parties arbitrator under the provisions of the Agricultural Holdings Act, 1923. At the opening of the hearing the landlords contended that the arbitrator had no valid appointment, and the arbitrator agreed to state a case for the opinion of the Court as to whether the arbitrator's appointment was valid or not, but it was agreed by both parties, in order to save expense, that the arbitrator should continue with the hearing of the case without prejudice to the landlords' contention that

there could be no arbitration under the Agricultural Holdings Act, 1923, between them and the bank.

6. It was conceded by the landlords that if the bank was the tenant within the definition contained in s. 57, sub-s. 1, of the Agricultural Holdings Act, 1923, they (the landlords) were liable to account to the bank, subject to a set-off which they claimed, for certain sums which were payable by them in respect of tenant-right. The amount due to the landlords in respect of arrears of rent was admitted to be 321*l.* 9*s.* 6*d.*, and it was further admitted by the bank that the landlords were entitled to have such sum set-off against any amount found by the arbitrator to be due from the landlords to the bank. There was also a sum due to the landlords in respect of dilapidations, but the bank denied that there was any right in the landlords to have this sum or any part thereof. No question arose in this case as to figures.

7. Clause 26 of the tenancy agreement provided for a set-off of claims as between landlord and tenant at the expiration of the tenancy. Further it was proved before the arbitrator and admitted by the bank that it is a custom of the County of Huntingdon that where at the expiration of the tenancy of an agricultural holding there are claims and counterclaims between the landlord and the tenant the landlord deducts from the amount due to the tenant any sums due from the tenant in respect of arrears of rent or dilapidations and that the balance, if any, is the amount recoverable by the tenant from the landlord upon the tenant's outgoing.

8. By cl. 7 of the tenancy agreement the tenant covenanted (1.) that he would keep the premises in good and substantial repair during the term, and (2.) that he would leave the premises in good and substantial repair at the termination of the tenancy. The landlords took no steps under the provisions of the tenancy agreement to enforce the provisions of the aforesaid maintenance covenant during the period of the term of the lease, and no claim in respect of dilapidations was made against the tenant until after the term had expired.

9. Fields numbered 111, 6, 7, 16, 17, 19 and 21 in the schedule to the tenancy agreement which comprised the whole

of the arable land of this holding were laid down by Bryan Nichols during his tenancy to temporary pasture. The holding was let as partly arable and partly pasture and the buildings were adapted to the use of the holding as a mixed farm. The land was at all material times during the last year of tenancy out of shift.

On the aforesaid facts the landlords' contentions were: (*a*) that the bank were not the tenants of the holding within the definition of "tenant" in s. 57, sub-s. 1, of the Agricultural Holdings Act, 1923; (*b*) that the bank were not entitled under the provisions of the Agricultural Holdings Act, 1923, to appoint or concur in appointing an arbitrator under the said Act; (*c*) that the appointment of P. C. Gambell as arbitrator was invalid and of no effect; (*d*) that if there was a valid arbitration under the Agricultural Holdings Act, 1923, and in any event, the landlords were entitled by reason of cl. 26 of the tenancy agreement and/or by the custom of the County of Huntingdon to have deducted from the amount found due by the arbitrator from them to the bank in respect of the tenant's claim the amount of 321*l.* 9*s.* 6*d.*, arrears of rent, and the amount found due by the arbitrator from the tenant to them in respect of dilapidations, and that the amount, if any, recoverable by the bank from the landlords was the balance, if any, after such deductions were made; (*e*) that the arbitrator had the power, and that it was his duty to direct and award a set-off against the amount found due to the bank of the amounts due to the landlords for arrears of rent and for dilapidations, or so much thereof as was sufficient to extinguish the amount found due to the bank; (*f*) that if the bank was entitled to arbitrate under the Agricultural Holdings Act, 1923, and if the amounts found by the arbitrator to be due from the tenant to the landlords exceeded the amount found by the arbitrator to be due from the landlords to the bank in right of the tenant the balance thereof should be awarded by the arbitrator against the bank in favour of the landlords; (*g*) that in refraining from enforcing the maintenance covenant referred to in para. 8 of the case during the currency of the term they had not waived the breaches thereof, and were entitled to enforce such covenant at the termination of the term.

On the aforesaid facts the contentions of the bank were: (*a*) that they were assigns of the tenant or alternatively were persons deriving title from him and as such were entitled to appoint or concur in appointing an arbitrator under the provisions of the Agricultural Holdings Act, 1923, and that the appointment of P. C. Gambell as arbitrator was valid; (*b*) that the landlords having taken no steps before the expiration of the term to enforce the tenant's liability under his maintenance covenant—namely, to keep the premises in repair, must be deemed in making their claim for dilapidations to be relying solely upon the breach of the tenant's yielding up covenant—namely, to leave the premises in repair, alternatively to have waived the breaches of the maintenance covenant; (*c*) that the tenant's liability for breach of his covenant to leave in repair arose after the date of registration of the bank's charge; (*d*) further that if the landlords' claim for dilapidations could be made under the maintenance covenant the landlords could not in fact prove any debt due to them in that respect prior to the date of registration of the bank's charge; (*e*) that, conceding the existence of the custom proved and admitted before the arbitrator, the landlords were not entitled after registration of the charge to deduct as against the bank any sums in respect of breaches of covenant by the tenant for which the tenant's liability arose after the registration of the charge; (*f*) that the arbitrator had no power and no duty to direct and award a set-off save in respect of the landlords' claim for arrears of rent; (*g*) that notwithstanding that the tenant was in breach of his covenant under cl. 7 of the tenancy agreement the arbitrator ought to make an allowance to the bank as assignee of the tenant for the laying down of temporary pasture in fields Nos. 111, 6, 7, 16, 17, 19 and 21.

The questions of law submitted for the opinion of the Court were: (1.) was the appointment of P. C. Gambell as arbitrator under the Agricultural Holdings Act, 1923, valid? (2.) If the appointment of P. C. Gambell was valid as an

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arbitrator under the said Act (*a*) were the landlords entitled by reason of cl. 26 of the tenancy agreement and/or by the custom of the County of Huntingdon to have deducted from the amount found by the arbitrator to be due from them to the bank in respect of the tenant's claim the amount found by the arbitrator to be due from the tenant to the landlords in respect of dilapidations, and was the amount, if any, recoverable by the bank from the landlords the balance, if any, after such deduction in respect of arrears of rent was made? (*b*) Had the arbitrator the power and was it his duty to direct and award a set-off against the amount found due to the bank of the amounts due to the landlords for arrears of rent and for dilapidations or so much thereof as was sufficient to extinguish the amount found due to the bank? (*c*) And if the amounts found by the arbitrator to be due from the tenant to the landlords exceeded the amount found due by the arbitrator from the landlords to the bank in right of the tenant was it the duty of the arbitrator to award such balance against the bank in favour of the landlords, and if not how was the arbitrator to deal with such balance, if any, in his award?

The county court judge held that there was no valid submission to arbitration by reason of the fact that the bank never were tenants of the holding within the meaning of the Agricultural Holdings Act, 1923. The charge, on which the arbitration was based, in no way vested the land, or the benefit of the contract of tenancy, in the bank, and as s. 16, sub-s. 1, only provided for arbitration between landlord and tenant, it followed that the appointment of the arbitrator was invalid. He accordingly gave judgment for the landlords on the first question in the case stated by the arbitrator. The consideration of the other questions was reserved.

The bank appealed.

P. B. Morle and *Cyril Conner* for the appellants. The county court judge was wrong in holding that the only person who was entitled to arbitrate with a landlord under the Agricultural Holdings Act, 1923, was a person in whom either the holding itself was vested or who was entitled to the benefit of the contract of tenancy. The bank as mortgagees of the tenant under an agricultural charge come within the definition of "tenant" in s. 57 of the Agricultural Holdings Act, 1923, and are therefore entitled to go to arbitration with the landlords. The word "tenant" is defined not only as "the holder of land," but also as including "assigns" and "other person deriving title from a tenant" without the addition of the words "to the land." Those words are sufficiently wide to cover the bank in the present case. Parliament intended to permit a person to arbitrate with the landlord who was an assignee of the tenant right and not of the holding itself. The only really practicable remedy which is open to a person entitled to the tenant right is that of proceeding by valuation, and in default of agreement between the valuers by arbitration under the Act. The language of the section is wide enough to include an assignee of the tenant and does not require that the person seeking to arbitrate should have the land vested in him. If however the bank are not entitled to arbitrate in their own name but must enforce their remedies in the name of the tenant it does not follow that the bank stand in the shoes of the tenant for all purposes as against the landlord. The intention of Parliament, as shown by ss. 6 and 7 of the Agricultural Credits Act, 1928, was that tenant right should be freely assignable by the tenant and chargeable in favour of a bank, and that the bank should not be bound by rights which arose subsequent to the charge otherwise the security which Parliament gave to banks as an inducement for them to lend money to farmers was purely imaginary. The bank are entitled to have the question as to the tenant's right to compensation, which has been assigned to them, decided by arbitration, and the arbitrator ought to have exercised his jurisdiction and found out what the claims were.

Evershed K.C. and *C. L. Henderson* for the respondents were not required to argue the question whether these proceedings could be taken at the instance of the bank.

GREER L.J. In this case the National Provincial Bank Ld. are entitled to a charge drawn up under the provisions of the Agricultural Credits Act, 1928, upon the agricultural assets of a farmer named Bryan Nichols who was the tenant of an agricultural holding at Leighton, in Huntingdonshire. "Other agricultural assets" are defined in the Agricultural Credits Act of 1928 as meaning "a tenant's right to compensation under the Agricultural Holdings Act, 1923, for improvements, damage by game, disturbance or otherwise, and any other tenant right." Of course, there can be no doubt that either under the provisions of that Act or apart from that Act a farmer can pledge to his bank his agricultural assets as so defined by the Act of 1928; but it does not follow that the assignee of those agricultural assets becomes the "tenant" within the meaning of the Agricultural Holdings Act, 1923, so as to entitle him to proceed to arbitration with the landlord, which is supposed to be a convenient method of having his rights determined with reference to, amongst other things, tenant right and his right to compensation under the provisions of the Act of 1923. That statute in s. 57, sub-s. 1, defines "tenant" in these terms: "'Tenant' means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant, or other person deriving title from a tenant." I cannot regard that definition as including those who are merely assignees of the assets of a tenant and not assignees of his tenancy agreement. For these reasons, on the question which was by the consent of both parties propounded for the decision of the county court judge, the landlords were right and the bank were wrong, and this appeal, therefore, must be dismissed because the decision of the county court judge was right.

Then the question arises whether in these circumstances we ought to say that these proceedings from the very commencement were null and void. There was no jurisdiction in the arbitrator either to determine the facts or to state a case. There was no jurisdiction in the judge to come to a determination on the case stated. There is, therefore, accordingly no jurisdiction in this Court to deal with the matter at all, but I think that a point of that sort ought not to be taken, and that the appellants in this case who have appealed on the question ought not to be allowed to take a point of that sort and deprive this Court of the power to order them to pay the costs of the appeal. I think the order ought to be that the appeal should be dismissed with costs.

Maugham L.J. I am of the same opinion. The case arises out of a tenancy of an agricultural holding granted by the Ecclesiastical Commissioners for England to one Bryan Nichols to hold from October 11, 1926, from year to year. By a charge under the Agricultural Credits Act, 1928, dated April 29, 1933, the tenant charged in favour of the National Provincial Bank, Ld., who are the appellants here, his farming stock and other agricultural assets, as defined in s. 5, sub-s. 7, of the Agricultural Credits Act, 1928. The charge was duly registered on May 5 of that year, and by notice from the bank became a fixed charge on October 14, 1933, and the bank on the same date appointed a receiver of the assets comprised in the charge. The farmer was in difficulties. On December 5 a receiving order was made against him, and he was adjudicated a bankrupt in due course and a trustee in bankruptcy was appointed. Within two months from the termination of the tenancy the bank, under their charge, made a claim to the whole of the sums due from the landlords to the tenant at the termination of the tenancy, free from deductions. That claim has been disputed, and in particular the landlords claim to deduct arrears of rent and divers sums for dilapidations to which the tenant was liable under his lease. An arbitrator was appointed under the Agricultural Holdings Act, 1923, by both parties. The matter comes before us on a special case stated by the arbitrator. It has been before the learned county court judge, who has decided that there was no valid submission to arbitration by reason of the fact that the

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bank never were "tenants" of the holding within the meaning of the Agricultural Holdings Act. That depends upon the definition of a "tenant" in the Agricultural Holdings Act, 1923, which is to be found in s. 57, sub-s. 1, of that Act. The word "tenant" is defined as meaning "the holder of land under a contract of tenancy"—and that certainly does not include the bank—"and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant, or other person deriving title from a tenant." To my mind there is not a word in that part of the definition beginning with the words "and includes" which points to the conclusion that "tenant" is intended to include a person who is not in any true sense a tenant, or the assign of a tenant in any ordinary meaning of the word, or that it includes either a mere assign of farming stock and other agricultural assets or a person who happens to be an assign of a right to compensation under the Agricultural Holdings Act, 1923.

There seems to me to be a number of difficulties in holding that notwithstanding the fact that the words do not point to a person or a company in the position of the bank yet they ought to be held to include such a person. A tenant who is making a claim under the Agricultural Holdings Act, 1923, against his landlord is, of course, liable to have all sorts of counterclaims made against him, and s. 16 of the Act clearly points to the fact that any counterclaim, so to speak, by the landlord has to be referred to arbitration in just the same way as the claim of the tenant. I will not read the section, since it is quite clear that the arbitrator has to decide by whom a sum on balance is to be paid. The object of the appellant here in bringing his claim in the way in which he has brought it, as an assign of the tenant, without having the trustee in bankruptcy or the original tenant before the arbitrator, admittedly has been based on the view, or the hope, that he will thereby be entitled to obtain by virtue of a charge on the right to compensation payment of the amount due by the landlord without allowing the landlord to make the counterclaim which he is justified in making under s. 16 of the Agricultural Holdings Act. It is sufficient, as my Lord has pointed out, to decide that such a person as the bank is not a tenant within the meaning of the Agricultural Holdings Act, 1923, and is therefore not entitled to arbitrate in its own name, as it has sought to do. I will add that I conceive there are very great difficulties in holding that a person who may be only an assign of some portion of the right to compensation payable to the tenant is entitled to the alleged rights which he claims here, not suing in equity in the name of the tenant or his assign and not making the tenant or his assign a party to the proceedings. It seems to me reasonably clear that the bank are not "tenants" within the meaning of the section and that therefore these proceedings will not lie.

If proceedings take place in reliance on an equitable assignment it will be well for the bank to remember that an assignee of moneys to arise under a contract (and a tenancy is a contract) will only be entitled to them subject to the conditions of the contract itself; and the advisers of the bank will no doubt consider the judgment of the Privy Council in *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1)

I agree that this appeal must fail with the consequences mentioned by my Lord.

ROCHE L.J. I agree that this appeal should be dismissed. The bank, who are appellants, were entitled to the benefit of an agricultural charge under the short term credit provisions of the Agricultural Credits Act, 1928. The farmer who gave the charge went bankrupt and also went out of the farm of which he was tenant. Certain of the assets situate on the farm had been charged in favour of the appellants. Thereupon the bank preferred a claim that as they were entitled under their charge to the benefit of the agricultural assets of the chargor, which included his tenant right, therefore they could proceed by way of arbitration under the Agricultural Holdings Act, 1923, to assert in their own name and without the concurrence of the tenant a claim under the Act and

(1) (1888) 13 App. Cas. 199.

otherwise which was independent altogether of the rights of the tenant in the sense that they claimed to take all the benefits to which he might be entitled as an outgoing tenant from his landlord without giving credit for any of the outgoings or dilapidations to which the claim of the tenant would be subject.

For the reasons assigned by the Lords Justices who have given judgment, such a claim, in my opinion, is altogether untenable and no such arbitration by virtue of an independent right is open to the bank, and I should be indeed surprised if in an arbitration any more than in equity the bank or the persons entitled to the benefit of a charge should get any such rights as were claimed in these proceedings. I agree also as to the costs of the proceedings, because the effect of what was done was that all parties asked the arbitrator to do what he otherwise could not do, decide as a preliminary point the extent of his own jurisdiction, and asked that a case should be stated by the arbitrator for the consideration of the county court judge and ultimately for the consideration of this Court. In those circumstances the proper order seems to be that those who have failed should pay the costs of the proceedings.

Appeal dismissed.

Solicitors for appellants: *Wilde, Sapte & Co.*

Solicitors for respondents: *Milles, Jennings White & Foster.*

R. F. S.

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[1932. R. 2021.]

Contract—Commission to paint Portrait—Sale of Goods—Work and Labour—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4.

The defendant orally commissioned the plaintiff, an artist, to paint the portrait of a lady and promised to pay 250 guineas therefor. The defendant subsequently repudiated the contract before the portrait was completed. In an action by the plaintiff for the agreed price of the portrait:—

Held, that it was a contract for work and labour and not for the sale of goods, as the substance of the contract was that skill and labour should be exercised upon the production of the portrait, and that it was only ancillary to that contract that there would pass from the artist to his customer some materials—namely, the paint and the canvas, in addition to the skill and labour involved in the production of the portrait, and that therefore the plaintiff could recover notwithstanding that there was no note or memorandum in writing of the contract.

Clay v. *Yates* (1856) 1 H. & N. 73; 25 L. J. (Ex.) 237 and *Lee* v. *Griffin* (1861) 1 B. & S. 272; 30 L. J. (Q. B.) 252 considered.

Dictum of Blackburn J. in *Lee* v. *Griffin* 1 B. & S. 278; 30 L. J. (Q. B.) 254 doubted.

APPEAL from a decision of Acton J.

The plaintiff, William Howard Robinson, who was a portrait painter, claimed to recover from the defendant, Frederick Beresford Johnston Graves, the sum of 262*l.* 10*s.* as being the agreed fee for a portrait commission given by the defendant to the plaintiff.

The plaintiff alleged that by a contract made verbally on July 27, 1932, the defendant commissioned the plaintiff to paint, and agreed to pay for, a three-quarter length portrait of a lady, who had since become the defendant's wife, for the sum of 250 guineas, one-half of which was to be paid in advance, subsequently reduced to 100 guineas paid in advance. The plaintiff commenced to paint the portrait, the lady giving him a sitting for that purpose, but the defendant on August 2, 1932, wholly repudiated and put an end to the contract.

The defendant by his defence denied that he had given a commission to the plaintiff to paint the portrait or had

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agreed to pay the plaintiff 250 guineas therefor. He also relied upon the provisions of s. 4 of the Sale of Goods Act, 1893. (1)

Acton J. accepted the evidence of the plaintiff and held that a contract for the painting of the portrait had been made, but that according to the decision in *Lee* v. *Griffin* (2) it was an agreement for the sale of goods of the value of more than 10*l.*, of which contract there was no note or memorandum in writing, and that therefore it came within s. 4 of the Sale of Goods Act, 1893, and was not enforceable by action.

The plaintiff appealed.

Sylvain Mayer K.C. and *John Fennell* for the appellant. This was not a sale of goods within s. 4 of the Sale of Goods Act, 1893, and therefore there was no necessity for a note or memorandum in writing of the contract. The contract was one for work and labour. If work and labour constitute the essence of the contract that is decisive that the contract is not one for the sale of goods. This is particularly true in the case of a work of art. In Addison on Contracts, 11th ed., p. 867, it is stated that " In the case of works of art the work and skill of the workman constitute, in general, the essence of the contract, the materials being merely accessorial; and, whenever the skill and labour are of the highest description, and the materials of small comparative value, the contract is a contract for work, labour and materials, and not a contract of sale." The effect of the cases is stated in Benjamin on Sale, 7th ed., p. 177, as follows: " The principles already discussed have shewn that a contract of sale is not constituted merely by reason that the property in materials is to be transferred to the employer. If they are simply accessory to work and labour, the contract is for work, labour, and

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(1) Sale of Goods Act, 1893, s. 4, sub-s. 1: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

(2) 1 B. & S. 272; 30 L. J. (Q. B.) 252.

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materials." In *Clay* v. *Yates* (1) the contract was that the plaintiff, a printer, should print for the defendant a second edition of his book, the plaintiff to find the material including the paper, and it was held that it was a contract to do work and labour, and not a contract for the sale of a thing. Pollock C.B. said (2): "It seems to me the true rule is this, whether the work and labour is of the essence of the contract, or whether it is the materials that are found. My impression is, that in the case of a work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labour of the highest description, and the material is of no sort of importance as compared with the labour; and therefore that all this would be recoverable as work and labour and materials found." Martin B., in the course of the argument, said (3): "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it, which is worth 10s., surely he might recover under a count for work and labour." The decision of Mathew J. in *Isaacs* v. *Hardy* (4), where he held that a contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price was a contract for the sale of a chattel, is not helpful. No reasons are there given, and the action was by the picture dealer against the artist who was to bring the picture into existence. The contract was for something after work and labour had been done. In *Grafton* v. *Armitage* (5), Erle J. said in the course of the argument: "Suppose an attorney were employed to prepare a partnership or other deed: the draft would be upon his own paper, and made with his own pen and ink; might he not maintain an action for work and labour in preparing it?" *Lee* v. *Griffin* (6), which is relied upon by the other side, is not a decision which is really against the present contention. It was there held that a contract to make a set of artificial teeth was a contract for the sale of a chattel and therefore within s. 17 of the

(1) 1 H. & N. 73; 25 L. J. (Ex.) 237.

(2) 25 L. J. (Ex.) 239.

(3) 1 H. & N. 76.

(4) (1884) Cab. & E. 287.

(5) (1845) 2 C. B. 336, 339; 15 L. J. (C. P.) 20, 21.

(6) 1 B. & S. 272; 30 L. J. (Q. B.) 252.

Statute of Frauds. In that case Crompton J. said (1): "It may be the cause of action is for work and labour, when the materials supplied are merely ancillary, as in the case put of an attorney or printer." The remarks of Blackburn J. (2) in that case went further than were necessary for the decision of that case and are not binding. Under s. 5, sub-s. 1 (*a*), of the Copyright Act, 1911, the copyright in a portrait is in the person by whom such portrait was ordered.

Sylvester Gates and *Norman F. Stogdon* for the respondent. The true test between a contract for sale of goods and a contract for work and labour is that laid down by Blackburn J. in *Lee* v. *Griffin* (3), where he said (4): "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy." Later he said: "I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been the less for the sale of a chattel." The test that was laid down by Blackburn J. in 1861 has stood unchallenged till to-day. It has been cited and approved in several cases. Mathew J. held in *Isaacs* v. *Hardy* (5) that a contract by an artist to paint a picture at an agreed price was a contract for the sale of a chattel. That is a clear authority in the present case. Lord Reading C.J. in *Rex* v. *Wood Green Profiteering Committee* (6) said: "The cases of *Lee* v. *Griffin* (3) and *Isaacs* v. *Hardy* (5) shew that to

(1) 30 L. J. (Q. B.) 253; 1 B. & S. 275.

(2) 30 L. J. (Q. B.) 254; 1 B. & S. 278.

(3) 1 B. & S. 272; 30 L. J. (Q. B.) 252.

(4) 30 L. J. (Q. B.) 254. [For the verbally different text of the authorized report see p. 589, post.]

(5) Cab. & E. 287.

(6) (1919) 89 L. J. (K. B.) 55.

determine whether or not there has been the sale of an article the value of the labour, as compared with that of the materials, cannot be taken into account." In Benjamin on Sale, 7th ed., p. 172, the rule is stated thus: "If the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel." In an article on s. 17 of the Statute of Frauds in the Law Quarterly Review for January, 1885 (pp. 1, 9), written by the late Mr. Justice Stephen and Sir Frederick Pollock, a contract for the sale of goods is defined as "a contract by which the vendor promises to transfer to the purchaser, and by which the purchaser promises to accept from the vendor, a transfer of property in goods, whether the goods are delivered at the time of the contract or are intended to be delivered at some future time, and whether the goods are, at the time of the contract, actually made, procured, or provided, or fit or ready for delivery or not, and whether or not any act is requisite for making or delivering or rendering them fit for delivery." One of the illustrations given is: "A promises to paint a picture of great value for B, A finding the paint and canvas, which are of small value, and B promising to pay for the whole as a work of art. This is a contract for the sale of goods." The test laid down by Pollock C.B. in *Clay* v. *Yates* (1) is not binding to-day. All the judges in *Lee* v. *Griffin* (2) agreed with the test that if the contract be such that a chattel is ultimately to be delivered by the plaintiff to the defendant, the cause of action is goods sold and delivered.

GREER L.J. We need not trouble you, Mr. Sylvain Mayer. This appeal raises a very interesting question, which has been well argued and is not free from difficulty, having regard to the fact that there has not yet been any actual decision on the point involved in this case, though there have been in some of the cases dicta tending in one direction and in others dicta tending in the other direction. The question to be decided is this: Whether when a person goes to an artist

(1) 1 H. & N. 73, 78; 25 L. J. (Ex.) 237, 239.

(2) 1 B. & S. 272; 30 L. J. (Q.B.) 252.

to have a portrait painted, it may be his own portrait or the portrait of some friend (as for instance his wife), and the commission is accepted by the artist, they are making a bargain for the manufacture of future goods to be delivered when those goods come into existence in circumstances which make it a sale of goods within the meaning of s. 4 of the Sale of Goods Act, 1893, which has now taken the place of s. 17 of the Statute of Frauds relating to the sale of goods.

I propose to look at the question first without dealing with the authorities, because after all we are dealing with the meaning of the English language in the statute and its application to particular facts. I can imagine that nothing would be more surprising to a client going to a portrait painter to have his portrait painted and to the artist who was accepting the commission than to be told that they were making a bargain about the sale of goods. It is, of course, possible that a picture may be ordered in such circumstances as will make it an order for goods to be supplied in the future, but it does not follow that that is the inference to be drawn in every case as between the client and the artist. Looking at the propositions involved from the point of view of interpreting the words in the English language it seems to me that the painting of a portrait in these circumstances would not, in the ordinary use of the English language, be deemed to be the purchase and sale of that which is produced by the artist. It would, on the contrary, be held to be an undertaking by the artist to exercise such skill as he was possessed of in order to produce for reward a thing which would ultimately have to be accepted by the client. If that is so, the contract in this case was not a contract for the sale of goods within the meaning of s. 4 of the Sale of Goods Act, 1893.

There are only two cases to which I think it is necessary to refer. The first case is *Clay* v. *Yates*. (1) That case was concerned with the question whether a contract with a printer to print and deliver a book to a customer who desired to have it printed was or was not a sale of goods. In the course of the argument Martin B. said this (1): "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it, which is worth 10s., surely he might recover under a count for work and labour." I regard that as an expression of opinion by a high authority on all questions of the common law that in those circumstances there would not be any sale of goods, but there would be a contract for work and labour; and in the judgments which follow the learned judges seem to me to agree with that view, because Pollock C.B. uses these words (2): "My impression is, that in the case of a work of art, whether in gold, silver, marble or plaster, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour and materials." Alderson B. agreed with that judgment and did not find it necessary to add anything, and then Martin B. says (3): "I am of the same opinion. There are three matters of charge well known to the law, viz., for labour simply, for labour and materials, and for goods sold and delivered. Now every case must be judged of by itself, and what is the present case?" Then he deals with that case and agrees with the judgment that had been delivered by the Chief Baron. Bramwell B. says (4): "I did not hear the whole of the argument, and will not therefore give a decided opinion, but I am inclined to think the plaintiff is entitled to recover, even assuming Mr. Quain's argument to be right. The contract is to print a treatise and a dedication, the latter to be thereafter furnished. That imposed on the defendant the obligation of furnishing a dedication, such as the plaintiff could by law print." A contract to make a portrait or produce a portrait involves the fact that the person whose portrait is to be painted should contribute something, that is to say he should contribute the sittings which are necessary for the purpose of enabling the portrait to be painted.

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(1) 1 H. & N. 73; 25 L. J. (Ex.) 237.

Now it is said that that case is inconsistent with the

(1) 1 H. & N. 76.
(2) Ibid. 78.
(3) 1 H. & N. 79.
(4) Ibid. 80.

subsequent case of *Lee* v. *Griffin.* (1) So far as the facts of that case are concerned it affords no help to the decision of the present case, because it was concerned with the question whether, when a dentist undertakes to make a plate of false teeth—more frequently called a denture—that is or is not a sale of goods. In that case the principal part of that which the parties are dealing with is the chattel which will come into existence when such skill as may be necessary to produce it has been applied by the dentist and those who work for him; but in the course of delivering the judgments in that case Crompton J. and Hill J. said nothing whatever which would throw any doubt upon the views expressed in the earlier case of *Clay* v. *Yates.* (2) Crompton J. says (3): "However, on the point which was made at the trial, whether the plaintiff could not succeed on the count for work, labour, and materials, I am also clearly of opinion against the plaintiff. Whether the cause of action be work and labour, or goods sold and delivered, depends on the particular nature of each individual contract"; and then he refers to the case of *Clay* v. *Yates* (2) as turning upon the peculiar circumstances of the case, and concludes with these words: "I do not agree with the proposition, that whenever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labour, and not for the sale of a chattel; it may be the cause of action is for work and labour, when the materials supplied are merely ancillary, as in the case put of an attorney or printer. But in the present case the goods to be furnished, viz., the teeth, are the principal subject-matter; and the case is nearer that of a tailor, who measures for a garment and afterwards supplies the article fitted." In giving judgment Hill J. says this (3): "The proposition of Bayley J., that where a person has bestowed work and labour on his own materials he cannot maintain an action for work and labour, is certainly not universally true; and Tindal C.J., as well as the other members of the Court, in *Grafton* v. *Armitage* (4), repudiated that doctrine, and explained that Bayley J. must be regarded as speaking with reference to the particular circumstances of the case then before this Court; and the same view was taken by the Court of Exchequer in *Clay* v. *Yates*" (1), the case to which I have already referred. It is quite true that in giving judgment Blackburn J. (to whose views on any question of contract or of common law the greatest weight is to be attached) uses these words (2): "The other question is, whether the present was a contract for the sale of goods, or for work and labour. In order to ascertain this you must of course, in each case, look at the contract itself. If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting." Lower down in his judgment he says: "An attorney employed to draw a deed is a familiar instance of the latter proposition"—that is to say where the action is for work and labour—"and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered." Then he quotes Tindal C.J. in *Grafton* v. *Armitage* (3), observing of *Atkinson* v. *Bell* (4): "The substance of the contract was, goods to be sold and delivered by the one party to the other." I treat that judgment as indicating that in the view of Blackburn J. one has to look to the substance of the contract. If you find, as they did in *Lee* v. *Griffin* (5), that the substance of the contract was the production of something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if the substance of the contract, on the other hand, is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture.

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(1) 1 B. & S. 272; 30 L. J. (Q. B.) 252.

(2) 1 H. & N. 73: 25 L. J. (Ex.) 237

(3) 30 L. J. (Q. B.) 253.

(4) 2 C. B. 336; 15 L. J. (C. P.) 20.

(1) 1 H. & N. 73; 25 L. J. (Ex.) 237.

(2) 30 L. J. (Q. B.) 254.

(3) 2 C. B. 336; 15 L. J. (C. P.) 20.

(4) (1828) 8 B. & C. 277.

(5) 1 B. & S. 272; 30 L. J. (Q. B.) 252.

For these reasons I am of opinion that in this case the substance of the matter was an agreement for the exercise of skill and it was only incidental that some materials would have to pass from the artist to the gentleman who commissioned the portrait. For these reasons I think that this was not a contract for the sale of goods within the meaning of s. 4 of the Sale of Goods Act, 1893, but it was a contract for work and labour and materials.

That disposes of the subject-matter of this appeal with this exception, that it does not follow that the plaintiff is entitled, as damages, to the full amount that he would have recovered if he had been allowed to complete the contract, because there would have to be some expenditure by the artist upon the cost of the canvas and the coats of paint to be put upon the canvas, and that ought to be deducted for that as well as for release of the artist's time for other work. As no such question was raised or discussed at the trial we think that in the circumstances it is open to this Court to say that something ought to be deducted, and the damages, therefore, should be, not the 250*l.* claimed, but, say, 200*l.* We have to make a guess, and this is rather on the generous side towards the artist; but the only alternative would be to send the case back for a new trial, a course which, as I understand the argument, neither party is desirous should be taken.

For these reasons I think there ought to be judgment for the plaintiff for 200*l.* damages.

SLESSER L.J. I am of the same opinion. In this case the plaintiff is unable to produce any document in writing sufficient evidentially to maintain his contract which has been found to have been made, orally, with the defendant. If this be a contract for work and labour done that does not hurt him. If it be a contract for the sale of goods or an agreement to deliver goods under a sale, then the objection has been held to be fatal to him. In my opinion this is a contract for work and labour.

The question whether such a contract is for sale of goods or for work and labour done which ultimately may produce a chattel which is delivered to the purchaser has vexed jurists from the earliest ages. According to the Civil Law as finally settled by Justinian, the test whether a contract was locatio conductio operis or emptio venditio depended upon whether the material was supplied by the employer or by the workman. That view appears to have been accepted by Bayley J. in the case of *Atkinson* v. *Bell* (1), but since that time the dictum of Bayley J. has been repudiated in all the authorities. It was repudiated in *Grafton* v. *Armitage* (2) by Maule J. and Erle J. and has not since been followed. The English doctrine is far more elastic in this matter than that contained in the Institutes of Justinian or in most of the foreign Civil Codes. The question of the ownership of the material on which the work is done is not conclusive of the matter.

Now another test which has been suggested is that which appears particularly prominently in the judgment of Blackburn J. (as he then was) in the case of *Lee* v. *Griffin.* (3) There Blackburn J. says this: "I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel." It is that observation of that very learned judge which has given me considerable doubt and difficulty in this case, but I have come to the conclusion, looking at the authorities as a whole, and considering the matter as one of principle myself, that if Blackburn J. there meant to state that whenever there was an agreement whereby a chattel would ultimately have to be delivered there was of necessity a sale of the chattel, he is stating the matter too broadly. As is indicated by the old plea in Bullen & Leake for a common indebitatus account for work done, what is claimed is "money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff for the defendant at his request"; and

(1) 8 B. & C. 277, 283.

(2) 2 C. B. 336; 15 L. J. (C. P.) 20.

(3) 1 B. & S. 272, 278.

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normally, in the class of case which we have here to consider, when the work has to be done in order to make the chattel fit for ultimate delivery to the purchaser, there will always be, or nearly always be, some material which at some stage or another will have to be delivered, and if that be the only test, so that the ultimate delivery of some material decides that the subject-matter is the sale of goods, I would find it difficult to understand how such cases as the delivery of written documents of parchment by a solicitor, which have always been agreed to be questions of work and labour and not sale of goods, would not fall within the category of sale of goods. But I think that the authorities are clear to the contrary, notwithstanding the weighty observations of Blackburn J.

In the first of the two cases to which my Lord drew attention (to which, therefore, I need not refer in any detail), namely, the case of *Clay* v. *Yates* (1), Pollock C.B. says (2): "The true rule is this, whether the work and labour is of the essence of the contract, or whether it is the materials that are found." Then he gives the illustration of a work of art: "Whether it be silver or gold, or marble, or common plaster, that is a case of the application of labour of the highest description, and the material is of no sort of importance as compared with the labour; and therefore that all this would be recoverable as work and labour and materials found." Martin B. speaks to the same effect, and he says (3): "I do not think it is profitable to go into an inquiry of the other cases, for in the common sense and understanding of mankind, this is clearly a case of work and labour and materials."

In *Lee* v. *Griffin* (4), the later case, Crompton J. seems to me to support that view. He says (5): "I do not agree with the proposition, that whenever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labour, and not for the sale of a chattel; it may be the cause of action is for work and labour, when the materials supplied are merely ancillary, as in the case put of an attorney or printer "—to which I might add, a painter. Hill J. speaks of it being a sale of goods when the substance of the contract is goods to be sold and delivered, and therefore inferentially suggests that where it is not the substance of the contract but merely ancillary it may be a contract for work and labour; so that all these authorities seem to me to be consistent.

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(1) 1 H. & N. 73; 25 L. J. (Ex.) 237.

(2) 25 L. J. (Ex.) 239.

(3) Ibid. 240.

(4) 1 B. & S. 272; 30 L. J. (Q. B.) 252.

(5) 30 L. J. (Q. B.) 253.

There is one other matter which I would comment upon. It has been pointed out in this case, and is the fact, that under the Copyright Act, 1911, s. 5, sub-s. 1, it is provided that "the author of a work shall be the first owner of the copyright therein: Provided that (*a*) where, in the case of [a] . . . . portrait the . . . . original was ordered by some other person . . . . then, in the absence of any agreement to the contrary, the person by whom such . . . . original was ordered shall be the first owner of the copyright," and therefore there would be in such a case as this a restriction upon the proprietary rights of the painter to dispose of these goods which one would not have expected to find if the property in the goods was still in an unrestricted state in his disposition before he delivered them under the contract of sale of goods to the purchaser. One of the learned judges in an earlier case points out that in that particular case, where it was held that the contract was one for work and labour, there was a restriction on the power of the printer to dispose of the goods.

For these reasons I am of opinion that on the facts of this case it is here shown that the material, the paint and the canvas, were merely ancillary to the actual technical work of producing the work of art and that therefore this is a contract for work and labour. I will guard myself, however, by saying that I only decide this case upon its own particular facts. There may be cases where portraits are ordered in circumstances which would constitute the contract one for the sale of a picture as a chattel. In the circumstances of this case, however, where the portrait of a specific lady was ordered to be painted, and where, I think, the defendant who gave the commission impliedly contracted that the lady should give sittings in order that the work might be executed, I think it is impossible to say that the mere ultimate delivery of the

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picture would constitute a sale of goods. Consequently s. 4 of the Sale of Goods Act, 1893, affords no protection to the defendant in this case, and this appeal must be allowed.

Roche L.J. The defendant in this action desired that a portrait should be painted of a lady who subsequently became his wife. He, as the learned judge found, entered into a contract with the plaintiff, an artist, for the painting of the lady's portrait. The portrait was not painted because the defendant refused to go on with the contract. The artist, the plaintiff, sued the defendant for the price of the portrait or for damages. At the trial the defendant disputed the making of a contract. The judge found the facts in that matter entirely in favour of the plaintiff, and held that the contract alleged by the plaintiff was established. The learned judge, however, felt himself bound by the case of *Lee* v. *Griffin* (1) to hold that the contract between the parties was a contract of sale and not a contract for work and labour. In so doing the learned judge was, I think, too much influenced by an expression in Blackburn J.'s judgment (2) in that case in reference to a well known goldsmith artist of Renaissance Italy. With the greatest possible respect to the opinion of Blackburn J. I doubt if he was historically correct in regarding Benvenuto Cellini as a seller of his works of art. If I am not mistaken he generally worked for his noble patrons for a fee or for a salary on materials which they provided. But however that may be, the learned judge's conclusion that he was bound by *Lee* v. *Griffin* (1) to decide in favour of the defendant was, I think, a mistaken view. On the contrary I think that *Lee* v. *Griffin* (1) is an authority for a decision in favour of the plaintiff. In *Lee* v. *Griffin* (1) the authority of *Clay* v. *Yates* (3), which clearly is a decision in favour of the plaintiff, was recognized, and in *Lee* v. *Griffin* (1) Blackburn J., whose judgment has been principally relied on as an authority for the defendant, said this (2) : " If the work and labour be bestowed in such a manner as that the result

(1) 1 B. & S. 272 ; 30 L. J. (Q. B.) 252.

(2) 30 L. J. (Q. B.) 254.

(3) 1 H. & N. 73 ; 25 L. J. (Ex.) 237.

would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy. An attorney employed to draw a deed is a familiar instance of the latter proposition; and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered." Equally, in my judgment, if the history and reality of the transaction involved in the painting of a portrait of this kind is considered, it would be an abuse of language to say that the portrait is sold. In former days the phrase used would have been: "What painter are you going to employ to paint the portrait?" In these days the phrase is: "Who is commissioned to paint the portrait?" Both phrases alike are representative of a transaction which is a mandate or authority given to another for reward to execute a certain thing which you desire—namely, the production of a portrait or representation of yourself or some one whom you wish to be so represented. That was the language, I think, employed in this case. The evidence as reported was that the defendant asked the plaintiff his fee for a portrait of Miss Finnegan, and then later the plaintiff was commissioned to carry out the work.

In those circumstances, adopting the test put by Blackburn J. in *Lee* v. *Griffin* (1), I have no doubt that the proper conclusion to be drawn is that this was a contract not for the sale of goods but for the employment of an artist to do work which the defendant desired that he should do. The matter mentioned by Slesser L.J. as to the Copyright Act, 1911, tends, of course, in the same direction, because it is plain by reason of the Act, and I think also by reason of the nature of the contract between the parties, that it would be quite impossible and would amount to breach of contract if the plaintiff, when he had begun to paint this portrait, had left off and sold the portrait to somebody else. In no respect at all was it a transaction of which the end was the delivery of goods, but it was rather a transaction such as I have attempted to describe.

For these reasons I agree that the appeal should be allowed

(1) 1 B. & S. 277; 30 L. J. (Q. B.) 254.

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and that judgment should be entered for the plaintiff for the sum of 200*l*.

GREER L.J. I intended to say and would like to add, that in deciding as we have done we are not deciding anything which is necessarily contrary to the decision of Mathew J. in the shortly reported case of *Isaacs* v. *Hardy* (1), which dealt with a contract of a very different kind—namely, where a picture dealer, whose sole object was to acquire something which he might sell in his business, engaged an artist to paint and deliver to him a picture of a given subject at an agreed price. It must not be taken that we are in any way overruling that case or deciding whether it was right or wrong.

Appeal allowed.
Judgment for plaintiff for 200l.
Leave to appeal refused.

Solicitors for appellant: *Halliday, Clarke & Co.*
Solicitors for respondent: *Whitelock & Storr.*

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Constitutional law—Parliament—House of Commons—Privilege—Exemption of Members from liability to prosecution—Sale of intoxicating liquor without licence within precincts of House of Commons—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 65, *sub-s.* 1.

The House of Commons has the privilege of regulating its own internal affairs and procedure, including the sale, within the precincts of the House, of intoxicating liquor without a licence, through its employees in the Refreshment Department of the House.

The applicant applied in the police court for summonses against certain members of the Kitchen Committee of the House of Commons and the manager of the Refreshment Department of the House on the ground that they had on two occasions unlawfully sold by retail intoxicating liquor for the sale of which they did not hold a justices' licence as required by s. 65 of the Licensing (Consolidation) Act, 1910. The magistrate held that, assuming that there had been a sale of liquor without a licence, his jurisdiction was excluded by the privileges of the House and he declined jurisdiction. Rules nisi having been obtained by the applicant for orders in the nature of mandamus calling on the magistrate, the members of the Kitchen Committee affected and the manager of the Refreshment Department to show cause why the magistrate should not proceed to hear and determine the applications for the summonses :—

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(1) Cab. & E. 287.

Held, that in the sale of liquor in the precincts of the House without a licence, the House was acting, through its Kitchen Committee and its employee, the manager of the Refreshment Department, in a matter which fell within the scope of the internal affairs of the House and, therefore, within the privileges of the House so that no court of law had jurisdiction to interfere.

Observations of Lord Russell C.J. in *Williamson* v. *Norris* [1899] 1 Q. B. 7, dissented from.

RULES NISI for orders in the nature of mandamus.

On May 17, 1934, the applicant, Alan Patrick Herbert, laid two informations at Bow Street Police Court on applications by him for summonses against fifteen named Members of Parliament, being members of the Kitchen Committee of the House of Commons, and Robert John Bradley, manager of the Refreshment Department of the House of Commons, for having, as the applicant alleged, on April 10, 1934, at a refreshment room in the House of Commons, unlawfully sold by retail intoxicating liquor for the sale of which they did not hold a justices' licence as required by s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910.

In one information the applicant stated that on April 10, 1934, he and a friend, after listening in a room at the House of Commons to the proceedings in committee on a certain bill, visited a refreshment bar at 1.15 P.M. and were supplied with a glass of lager beer and a glass of gin and mixed vermouth. In the other information the applicant stated that at about 6.30 P.M. on the same day he visited the House of Commons with another friend. They were proceeding to a refreshment bar when they met a Member of Parliament who accompanied them to the bar, where they were joined by a fourth person.

The Member of Parliament ordered a round of drinks for the four persons and paid for them.

The Chief Metropolitan Magistrate, Sir Rollo Frederick Graham-Campbell, before whom the applications came, held that, assuming that an offence may have been committed, Members of Parliament carrying out duties entrusted to them by the House, under the control of the House, in a way long practised and approved by the House, and within the precincts of the House, were not amenable to the jurisdiction of the court, but were protected by the privileges of the House and were answerable only to the House of which they were Members. In coming to this conclusion he took the view that the legislative provision which he was asked to apply was a regulative enactment which, although it imposed penalties for its breach, did not deal with offences mala in se, such as the felonies and misdemeanours of the common law or other similar crimes made punishable by statute. As to Mr. Bradley, the manager, the magistrate held him to be protected by *Williamson* v. *Norris* (1), where it was held that a servant of the House of Commons who, while serving at a refreshment bar within the precincts of the House, sold intoxicating liquor was not liable to be convicted of the offence of selling intoxicating liquor without a justices' licence. He, therefore, declined to issue the summonses.

The applicant thereupon obtained rules nisi calling on the magistrate, the members of the Kitchen Committee sought to be summoned, and Mr. Bradley to show cause why the magistrate should not proceed to hear and determine the applications for the summonses, pursuant to the statutes in that behalf. The grounds on which the rules were granted were (1.) that the magistrate had erroneously held that his jurisdiction was excluded by the privilege of Parliament, and (2.) that he had erroneously declined jurisdiction.

Sir Thomas Inskip A-G. and *Wilfrid Lewis* showing cause against the rules. The main authority in favour of the applicant is the observations of Lord Russell C.J. in *Williamson*

(1) [1899] 1 Q. B. 7.

v. *Norris* (1) where he says : " I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply. It does not follow that intoxicating liquor can lawfully be sold without a licence, because some of the provisions of the Licensing Acts are inapplicable." But, in the first place, those remarks were purely obiter, as was the concurrence in them by Wills J. (2), and, in the second place, the argument presented here against the rules—namely, that the magistrate was right in holding that he had no jurisdiction to entertain the applications for summonses—could not have been addressed to the Court in *Williamson* v. *Norris* (3) because there the magistrate had accepted jurisdiction and the whole case turned on the question whether a servant could be convicted in respect of an unlawful sale of liquor which he had effected by order of his employer. It is submitted that it is a consideration which can properly be taken into account that the provisions of the Licensing (Consolidation) Act, 1910, are, at every point, difficult or impossible to apply to the House of Commons. In any case, *Williamson* v. *Norris* (3) affords a complete vindication for the respondent, Bradley.

The sale of liquor in the precincts of the House of Commons is a matter falling within the area of the internal affairs of the House which the House, and the House alone, is privileged to manage. The privileges of the House of Commons have never been defined. They must be ascertained from what has been recorded as having been done by the House. In the words of Blackstone, the privileges of Parliament are very large and indefinite and courts of law cannot determine the privileges of the High Court of Parliament: Blackstone's Commentaries, vol. i., p. 164. The privileges are " well-known . . . . to the two Houses, and to every member of them, as long as he continues a member ; but the knowledge is as incommunicable as the privileges to all beyond that pale " : per Lord Denman C.J. in *Stockdale* v. *Hansard*. (4) Coke was expressing an opinion in support of the view now contended for

(1) [1899] 1 Q. B. 7, 12.
(2) Ibid. 15.
(3) [1899] 1 Q. B. 7.
(4) (1839) 9 A. & E. 1, 112.

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when he said that the exercise of the "power of judicature" of the House of Commons was "best understood by reading the judgments and records of Parliament at large, ... and the book of the clerk of the House of Commons, which is a record . . . .": see Institutes, Part IV., c. 1, Of Judicature. Admittedly, a person committing an ordinary felony or misdemeanour, even on the very steps of the Speaker's chair, would not be protected by the privilege of the House, but would be amenable to the jurisdiction of the criminal courts. That, however, is merely because the House has never claimed the right to adjudicate on such matters. Adapting the words of Coke, there is no record of such a privilege having been exercised, and it can, therefore, be taken not to exist.

An extreme instance of the exercise of the privilege of the House of Commons, which shows how far-reaching is the privilege of the House when an Act is done by the House as a whole in the performance of its business—as in the present case, for the House had merely delegated to the Kitchen Committee work which it might have done itself—is contained in *Burdett* v. *Abbot* (1), where it was held that the Speaker of the House of Commons was protected from liability in an action of trespass in breaking into the house of a member of the House, arresting him, and taking him to the Tower on a charge of a breach of the privileges of the House, since the Speaker, in issuing his warrant for the arrest to the Serjeant-at-Arms, was acting in the execution of the orders of the House which was then sitting.

The privilege of the House cannot be confined to what takes place in the debating chamber itself. "All the privileges that can be required for the energetic discharge" by the members of the House of their duties must be "conceded without a murmur or a doubt": per Lord Denman C.J. in *Stockdale* v. *Hansard*. (2) The House sits for long periods and arrangements have to be made for heating the House when the weather is cold and the provision of refreshment for the mind in the library and refreshment for the body in suitable places. The regulation of those matters is clearly within the area of the internal affairs of the House and connected with the affairs of the House.

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(1) (1811) 14 East, 1.

(2) 9 A. & E. 115.

The House of Commons is not subject to the control of the courts in its administration of that part of the statute law which has relation to its internal procedure only. What is said and done within the walls of the House cannot be inquired into in a Court of law: per Lord Denman C.J. in *Stockdale* v. *Hansard* (1); *Bradlaugh* v. *Gossett.* (2) The House has the exclusive right to regulate its own internal concerns: Anson's Law and Custom of the Constitution, 5th ed., vol. i, p. 184. Short of a criminal offence committed within the House or by its order, no Court would take cognizance of that which passes within its walls. For this purpose the breach of a licensing law is not a "criminal offence."

Strauss (*Monckton K.C.* and *B. J. M. Mackenna* with him) supporting the rules. It is conceded that, if the claim of parliamentary privilege is sound, it applied to the respondent, Bradley, as well as to the members of the Kitchen Committee. If it is unsound, the rules should be made absolute against all the respondents. Evidence will be given, if the case before the magistrate proceeds, that Bradley acted knowingly, and a servant acting knowingly can be convicted of aiding and abetting: *Williamson* v. *Norris* (3), per Lord Russell of Killowen C.J. It is right that he should be charged as a principal offender: *Du Cros* v. *Lambourne.* (4) The magistrate has declined jurisdiction in his case as much as in the case of the other respondents. [On this point he was stopped.]

There is no evidence, and it cannot be a matter of judicial knowledge, that the conduct complained of in the informations has been long practised or approved by the House of Commons. There is no evidence of a resolution of the House authorizing the Kitchen Committee to commit the acts complained of. Even if there were, an order of the House authorizing a crime would not constitute a defence. Even if it constituted a defence, such defence should be pleaded in bar and not to the jurisdiction: *Jay and Topham's Case* (1), approved by Lord Ellenborough C.J., in *Burdett* v. *Abbot* (2) and by Lord Denman C.J. in *Stockdale* v. *Hansard.* (3) Nor is there any evidence that the conduct complained of has been long practised by the House. Even if *Williamson* v. *Norris* (4) were accepted as showing that it was practised in 1898, the Court would not presume that it has continued since then, for the Court will not presume the continuance of an unlawful state of things: *Price* v. *Worwood* (5), per Pollock C.B. It is impossible to acquire a prescriptive right to commit a crime. The House has never instructed or authorized the respondents to contravene the law. The circumstances which the magistrate set out as giving rise to a privilege excluding his jurisdiction have not been shown to exist. Even if they existed, they would not give rise to the privilege suggested. That privilege has never been recognized in wider terms than in *Bradlaugh* v. *Gossett* (6), which was cited on the question of jurisdiction in *Williamson* v. *Norris* (4) as appears from the report in the Law Times Reports. (7) The claim of privilege, if valid, was equally applicable to the facts of that case, but it received no support from the judgments of Lord Russell of Killowen C.J. and Wills, J. They were clearly of the opinion that the section of the Act under which the prosecution was brought applied to the House of Commons and that the Court had jurisdiction.

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(1) 9 A. & E. 114.

(2) (1884) 12 Q. B. D. 271.

(3) [1899] 1 Q. B. 7, 13, 14.

(4) [1907] 1 K. B. 40.

The privileges of Parliament do not apply to criminal matters and members of either House are subject to the ordinary course of criminal justice (Halsbury's Laws of England, 2nd ed., vol. ix., p. 25). The Courts have more than once intimated that a crime committed in the House of Commons or by its order would not thereby be considered outside their jurisdiction (Sir William Anson, The Law and Custom of the Constitution, 5th ed., vol. i., p. 186). *Bradlaugh* v. *Gossett* (6) lends no support to the present claim of privilege. In that case complaint was made of a resolution of the House. No such complaint is made in the present case. The privilege which *Bradlaugh* v. *Gossett* (1) established was the privilege of the House of Commons not to be subject to the control of His Majesty's Courts in its administration of "that part of the statute-law which has relation to its internal procedure only." The Licensing (Consolidation) Act, 1910, unlike the Parliamentary Oaths Act, 1866, does not fall within that category. The case is no authority for the proposition that nothing done in the House of Commons can be questioned by the Courts. The reasoning of Stephen J. (2) emphasizes the fact that no privilege was being asserted which would cover crime. He expressly declares that an ordinary crime committed in the House of Commons would not be withdrawn from the ordinary course of criminal justice. For this *Sir John Elliot's Case* (3) is a direct authority. Although the judgment of the Court of King's Bench was reversed by the House of Lords on other grounds, the decision on this point has never been questioned.

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(1) (1689) 12 St. Tr. 822.

(2) 14 East, 1, 109.

(3) 9 A. & E. 1, 133, 134.

(4) [1899] 1 Q. B. 7.

(5) (1859) 4 H. & N. 512, 514.

(6) (1884) 12 Q. B. D. 271.

(7) (1898) 79 L. T. 415.

The magistrate appeared to draw a distinction between mala prohibita and mala in se. No such distinction any longer exists: *Bensley* v. *Bignold* (4), per Best J.

For the purpose of determining jurisdiction, the Court must assume, as the magistrate assumed, that the Licensing (Consolidation) Act, 1910, applied to the House of Commons, that the House was not licensed and that the respondents sold, or authorized the sale of, intoxicating liquor as alleged in the informations. To claim in these circumstances that the Court has no jurisdiction is to claim a new privilege to commit a crime. If such a claim were upheld, it would upset the established law. The claim is novel, contrary to authority and unfounded.

[The following cases were also cited: *Reg.* v. *Monmouth Mayor & Assessors* (5); *Ex parte Wason* (6); *Wellesley* v. *Duke of Beaufort* (7); *Combe* v. *De la Bere* (8); *Cattell* v. *Ireson.* (9)]

(1) 12 Q. B. D. 271.
(2) Ibid. 283.
(3) (1629) 3 St. Tr. 294.
(4) (1822) 5 B. & Ald. 335, 341.
(5) (1870) L. R. 5 Q. B. 251.
(6) (1869) L. R. 4 Q. B. 573.
(7) (1831) 2 Russ. & My. 639.
(8) (1882) 22 Ch. D. 316.
(9) (1858) E. B. & E. 91.

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Lord Hewart C.J. I am satisfied that these rules should be discharged. In my opinion, the magistrate came to a correct conclusion on the sufficient materials that were before him.

I do not propose to review the long line of cases which have been cited to us, but it seems to me that the authorities relied on by the Attorney-General are much in point—in particular, *Burdett* v. *Abbot* (1); *Stockdale* v. *Hansard* (2); and *Bradlaugh* v. *Gossett*. (3) It was manifest to the magistrate, both from the documents which were before him and from the argument which was offered to him, that he was called on to deal with the House of Commons acting by its Kitchen Committee and the manager of its Refreshment Department. To pass over other matters, the words of Lord Denman C.J. in *Stockdale* v. *Hansard* (4) are sufficient for the present purpose. He said: "The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt." Here, as it seems to me, the magistrate was entitled to say, on the materials before him, that in the matters complained of the House of Commons was acting collectively in a matter which fell within the area of the internal affairs of the House, and, that being so, any tribunal might well feel, on the authorities, an invincible reluctance to interfere. To take the opposite course might conceivably be, in proceedings of a somewhat different character from these, after the various stages of those proceedings had been passed, to make the House of Lords the arbiter of the privileges of the House of Commons.

More than that, with the greatest respect for the observations of my illustrious predecessor, Lord Russell C.J., in *Williamson* v. *Norris* (5), it appears to me that the bulk of the provisions of the Licensing Acts are quite inapplicable to the House of Commons.

(1) 14 East, 1.
(2) 9 A. & E. 1.
(3) 12 Q. B. D. 271.
(4) 9 A. & E. 115.
(5) [1899] 1 Q. B. 7, 12.

It was conceded by Mr. Strauss that if there was no jurisdiction to adjudicate in the case brought against the members of the Kitchen Committee, there was no jurisdiction to adjudicate in the case against the manager of the Refreshment Department.

For these reasons, I am clearly of opinion that these rules ought to be discharged.

Avory J. I am of the same opinion. I have nothing to add to the reasons given by my Lord for holding on the authorities that the privileges possessed by the House of Commons are sufficient ground for deciding that these rules should be discharged, but I wish to add a few words on the question which was argued, but not decided, in *Williamson* v. *Norris*. (1) In other words, I wish to express my view that, even assuming that it were possible that either the House of Commons, or some official of it, could be licensed to sell intoxicating liquor under the Licensing (Consolidation) Act, 1910, it is impossible to apply the one provision of the Act which is relied on here—namely, s. 65, sub-s. 1, without having regard to all the other provisions of the Act, the great majority of which are wholly inapplicable to the House of Commons.

In this connection I wish to call attention to the argument presented by the Attorney-General in *Williamson* v. *Norris* (2) when he said: "In the first place, the Licensing Acts do not apply in any way to the House of Commons. By 1 & 2 Vict. c. 7, s. 5, and 30 & 31 Vict. c. 40, s. 2, the House of Commons is vested in the Queen. The Houses of Parliament do not come within the Rating Acts . . . . It does not follow that, because the House of Commons is not expressly mentioned in the list of exemptions contained in s. 72 [of the Licensing Act, 1872] the Act applies: s. 72 is not exhaustive. The whole of the Act must be looked at to see whether it can apply, and not merely the special words of exemption." Later he said: "The House of Commons has power to regulate its own internal procedure . . . . and to hold that it was subject to the Licensing Acts would be to take away this right. It is clear that many

(1) [1899] 1 Q. B. 7. (2) Ibid. 9.

of the provisions of the Licensing Acts could not possibly be made applicable to the House of Commons." I wish to adopt that argument as part of my judgment in this case.

It is true that Lord Russell C.J., in *Williamson* v. *Norris* (1), said: " It was argued for the respondent that no offence had been committed, on the ground that the Houses of Parliament, in the regulation of their internal arrangements as to the sale of liquor, were entirely outside the control of the law as to licensing. Having regard to the view which we take of the other question to which I have referred, it is not necessary for us to decide this question; but I think it right to say that I am far—very far from being satisfied that no offence has been committed. I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply." In my view, those words do not amount even to dicta. At the most they amount to an expression of doubt. Speaking with the most profound respect for even an expression of doubt by Lord Russell of Killowen, I have come to the conclusion that the argument addressed to the Court by the Attorney-General in that case ought to have prevailed and that, it being impracticable and impossible to apply the general provisions of the Licensing (Consolidation) Act, 1910, to the House of Commons, it is equally impracticable and impossible to apply s. 65, sub-s. 1, which forbids the sale of liquor without a licence.

Once it is made clear that the Licensing (Consolidation) Act, 1910, cannot be applied to the House of Commons, it follows that no Court of law has jurisdiction to entertain such an application as was made to the magistrate in this case. The question of jurisdiction did not arise in *Williamson* v. *Norris* (1), because there the magistrate had assumed jurisdiction and had stated a case. In the present case the question whether the magistrate had jurisdiction is involved. In my opinion, as the Act of Parliament was not applicable to the subject-matter before him, the magistrate

(1) [1899] 1 Q. B. 7.

had no jurisdiction and I agree that these rules should be discharged.

SWIFT J. I agree and I have nothing to add.

Rules discharged.

Solicitor showing cause: *Treasury Solicitor.*
Solicitors in support: *Bull & Bull.*

G. F. L. B.

BROWNING *v.* MRS. A. F. DUCKWORTH.

1934
July 13.
1935
Jan. 11.

Revenue—Income Tax—Profits of married woman—Wife resident in United Kingdom—Husband resident abroad for business purposes—Liability of wife to assessment—" Married woman living with her husband "—Assessment in name of husband—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *General Rules, r.* 16, *Proviso* (I.).

The Income Tax Act, 1918, General Rules, r. 16, provides: " A married woman . . . . entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(I.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee."

A lady on her marriage in 1925 went with her husband to Egypt where he carried on business and their permanent home was there. Every year she passed four and a half to five and a half months in England in order to escape the hot season in Egypt, and her husband also passed from two to four months in England during her yearly visit there. She owned certain War Loan stock and assessments to income tax in respect of the interest thereon were made upon her for the years 1925–6 to 1929–30. She appealed against these assessments to the Commissioners on the ground that they had been made upon her in disregard of the above proviso (I.). The appeal was argued on the footing that her husband was not resident in this country. The Commissioners, without expressing any opinion as to the lady's residence for the first two years, found that she was resident in the United Kingdom from the year 1927–8 onwards, but decided that the assessments were wrongly made upon her. On appeal to the High Court by the inspector of taxes:—

Held, notwithstanding the assumption that her husband was resident in Egypt and the finding that she herself was resident

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in this country, that the lady was "a married woman living with her husband" within the meaning of r. 16, proviso (1.), and consequently that the assessments upon her were wrong and should be discharged.

Leitch v. *Emmott* [1929] 2 K. B. 236; 14 Tax Cas. 633; and *Derry* v. *Commissioners of Inland Revenue*, 1927 S. C. 714; 13 Tax Cas. 30, referred to.

CASE stated by the Commissioners for the special purposes of the Income Tax Acts.

Before her marriage Mrs. A. F. Duckworth, wife of Mr. Godfrey Duckworth, a partner in a firm of cotton brokers in Alexandria, hereinafter called the respondent, lived with her mother in the United Kingdom. She married in 1925, having been acquainted with her husband from before 1920 when he had gone to Egypt. In October, 1925, she went to Egypt to take up her residence with her husband who had preceded her there in September, 1925. Since that date her permanent home had been in Egypt, where she and her husband had furnished a house, but she had returned regularly year by year to this country.

Before her marriage the respondent possessed 5000*l*. inscribed 5 per cent. War Loan and 1050*l*. War Loan in Bearer Bonds. On her marriage her mother gave her 10,000*l*. 5 per cent. War Loan. In the latter half of 1928, a legacy which she received was invested in 9000*l*. 5 per cent. War Loan. The interest on the above-mentioned War Loan (other than the bearer bonds) was paid to her without deduction of tax. Part of the War Loan holdings was sold in 1931 to pay for a house in Alexandria in Egypt which was built and had since been used by her and her husband as their permanent residence.

The following assessments to income tax were made upon the respondent for the years mentioned :—

for 1925–26 an assessment of 800*l*. for War Loan interest.
for 1926–27 an assessment of 800*l*. for War Loan interest.
for 1927–28 assessments of 1052*l*. 10*s*. for War Loan interest and 3*l*. for Bank interest.
for 1928–29 assessments of 1527*l*. 10*s*. for War Loan interest and 3*l*. 14*s*. for Bank interest.

for 1929–30 assessments of 1752*l.* 10*s.* for War Loan interest and 23*l.* 15*s.* for Bank interest.

These assessments were intended to cover the untaxed interest from War Loan owned by the respondent, but the amounts of the assessments were provisional and in any event required adjustment.

At a meeting of the Commissioners held on September 20, 1933, the respondent appealed against these assessments.

The appeal, as was stated in para. 4 of the case, was argued on the footing that the respondent's husband was not chargeable as resident for the years in question.

The respondent's evidence on the subject of her visits to this country, which the Commissioners accepted, was summarized in the case as follows: When she first went to Egypt she thought that in the hot season she might, like other European residents in Egypt, go to England, France or Italy for some months in every year. Actually she found the heat very trying, and she had in fact returned to England every year for a period varying between four and a half and five and a half months. She had come to England to see her mother and because she felt it her duty to spend her money in England and not in foreign countries. She first came back to England on June 1, 1926, and every year she had come back at about that time in the year. Her husband generally came back to England three weeks or so after her, and similarly returned to Egypt three weeks or so before her, and he had done so in all but two years since their marriage. His usual stay in England thus varied between two and four months. When in the United Kingdom the respondent stayed in London, visited relations in Scotland and elsewhere, and lived in hotels. Neither she nor her husband had ever taken a house here.

On behalf of the respondent it was contended that she ceased to be a resident in the United Kingdom when she left England in October, 1925; that it could not be said that she had again become a resident till a period of at least four years had expired; and that in any case she was at all material times after July, 1925, a married woman living

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with her husband within the meaning of the Income Tax Act, 1918, First Schedule, General Rules applicable to all Schedules, r. 16 (1), and accordingly that the assessments were wrongly made in her name, and could not be made upon her, and could only, if at all, be made upon or in the name of her husband. It was admitted, however, that the respondent was assessable in respect of War Loan interest received by her untaxed in June, 1925. No argument was addressed to the Commissioners upon the question of Bank interest on behalf of the respondent.

On behalf of the Inspector it was contended that the respondent was ordinarily resident in the United Kingdom throughout the whole period, and that the assessments were properly made in her name under the provisions of r. 16.

The Commissioners, whose decision was set forth in para. 7 of the case, expressed no opinion as to the respondent's residence for the first two years under appeal, but held that she was resident and ordinarily resident in the United Kingdom from the year 1927–28 onwards inclusive. They decided, however, that the assessments were wrongly made on the respondent, and they accordingly discharged them, except for the proper proportion of the year 1925–26 for which liability to assessment was admitted, the amount of which last mentioned assessment the parties informed the Commissioners would be agreed between them.

Sir T. Inskip A.-G. and *R. P. Hills* for the appellant. The assessments to income tax were rightly made upon the respondent, and the Commissioners were wrong in discharging them. The Income Tax Act, 1918, Rules applicable to all Schedules, r. 16, provides by its operative part that "a married woman . . . . being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried." The respondent is a married woman and she was entitled to the War Loan interest in question to her separate use, and therefore under that provision she was prima facie assessable to income tax upon

(1) The rule, so far as material, is set out above in the headnote.

it as if she were unmarried. It is true that by proviso (I.) to the rule the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name. That proviso cannot, however, apply to this case. In view of the facts that the appeal was argued on the footing that the husband was not resident here during the material years, and that the Commissioners found that the respondent was ordinarily resident here during these years, the respondent cannot be regarded as a married woman living with her husband within the meaning of the proviso. Moreover, inasmuch as the respondent's husband has been found to be resident abroad, and the Act provides no machinery for assessing a person who is resident abroad in such a case as this, but only provides machinery for assessing him in certain other special cases: see Sch. D, Case IV., r. 2, and General Rules, r. 4 seq., it must be presumed that the Legislature did not intend that a person resident abroad should be assessed here in such a case as this: see per Lord Herschell in *Colquhoun* v. *Brooks* (1), and if the respondent's husband could not himself be assessed here still less should the respondent be assessed here in his name under r. 16, proviso (I.). It must be presumed that the profits of a married woman resident in this country are subject to taxation, and proviso (I.) cannot therefore be construed as meaning that the profits of a married woman living with her husband are to escape taxation entirely because her husband is not resident here. It must be taken to imply that in that case her profits are to be assessed in her own name. That proviso does not alter the character of a married woman's income charged to tax or the measure of the tax imposed upon it, but merely provides with the object of facilitating the collection of the tax, that the assessment shall be made in the name of the husband, and that for that purpose the wife's income shall be treated as the income of the husband: per Lawrence L.J. in *Leitch* v. *Emmott*. (2)

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(1) (1889) 14 App. Cas. 493, 506; 2 Tax Cas. 490, 501.

(2) [1929] 2 K. B. 236; 14 Tax Cas. 633.

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J. M. Tucker K.C. and *J. S. Scrimgeour* for the respondent. The Commissioners were right in discharging the assessments. During the years in question the respondent was a married woman living with her husband, and consequently by the Income Tax Act, 1918, General Rules, r. 16, proviso (I.), her War Loan interest during these years should be deemed the profits of her husband and should be assessed and charged to tax in his name and not in hers. The fact that her husband is assumed not to be resident in the United Kingdom does not prevent him from being assessable. The proviso does not say that the wife's profits are to be deemed the profits of her husband "if he is resident in the United Kingdom," and in the absence from it of any such words, it clearly renders the respondent's husband and not herself chargeable in respect of this income. The Act makes provision for assessing persons resident abroad in respect of profits accruing in this country. The case of *Derry* v. *Commissioners of Inland Revenue* (1) is distinguishable from this case, because there the husband and wife were obliged to live apart owing to the husband being engaged in business abroad and the wife being prevented by illness from leaving England.

Finlay J. This case raises a narrow but rather curious question under the Income Tax Act, 1918, as to the proper construction of r. 16 of the General Rules applicable to all Schedules. [His Lordship read that rule and continued:] The facts are set out in the case stated. The respondent, who is a married woman living with her husband, is entitled to certain War Loan stock. In various years assessments to income tax were made upon her in respect of the interest on that stock, and the question which arises on the appeal is whether these assessments were right. The case mentions some details with regard to her holding of that stock, but these do not greatly matter. The respondent was married in July, 1925, and she went in October of the same year to take up her residence in Egypt with her husband, who had preceded her there in September of that year. Since that

(1) 1927 S. C. 714; 13 Tax Cas. 30.

time her permanent home has been in Egypt. They have furnished a house there and they live there. In every year the respondent has come home to England and her husband has also come home, but by reason of the circumstance that she apparently found the climate of Egypt trying, she was in England in each year for a longer period than her husband. She was here each year for from four and a half to five and a half months, while her husband's visits, though quite substantial, were considerably shorter, being for periods varying from two to four months only. In para. 4 of the case an assumption is stated to have been made—namely, that the appeal was argued on the footing that the husband was not chargeable as resident in the years in question. In para. 7 there is a finding by the Commissioners as to the respondent's residence. They expressed no opinion as to her residence for the first two years under appeal, but held that she "was resident and ordinarily resident in the United Kingdom from the year 1927–28 onwards inclusive." I of course accept that assumption and that finding, but I may point out that they lead to a somewhat curious result. If one were not bound by that assumption and that finding, one might well think that the husband and wife, both living together as they admittedly are, should be treated as either both resident in the United Kingdom, or, in the alternative, as both non-resident here. I have thought it right to mention that, if free to do so I might be disposed to adopt one or other of these alternative views, but it is not open to me to do so because, as I have said, I accept the assumption and am bound by the finding to which I have referred. I, therefore, say no more on that point which is not the point raised for my decision.

The Commissioners, having arrived at the finding stated in para. 7 of the case, go on to say this: "We decided, however, that the assessments were wrongly made on the respondent, and we accordingly discharged them, except for the proper proportion of the year 1925–26 for which liability to assessment was admitted." That is the view of the Commissioners and from that view I am unable to differ.

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The question is purely one of construction of r. 16. The rule has a longish history. It goes back to 1842, and, indeed, to a still earlier period; but it is unnecessary at present to consider its earlier stages.

The substance of my view can be very shortly expressed. The argument on behalf of the Crown does, I think, require that words should be read into r. 16, proviso (1.). It seems to me that it might be quite reasonable that the required words should be read into that proviso, but to put them into it is a matter for the Legislature and not for me. On the true construction of the proviso as it stands this lady would appear to be, as indeed she is admitted to be, "a married woman living with her husband" within the meaning of these words in the proviso. It accordingly follows that the assessment upon her must be bad. I rest my decision upon the construction of the proviso, the meaning of which seems to me to be clear, but I further think that an argument which was urged by Mr. Tucker is correct—namely, that, on the Crown's construction of proviso (1.) of the rule, proviso (2.) becomes unnecessary.

One or two cases have been cited—namely, *Colquhoun* v. *Brooks* (1); *Derry* v. *Commissioners of Inland Revenue* (2); and *Leitch* v. *Emmott* (3), but no case appears to be in point to cover the present. I decide the case on the construction of the rule, and I confess that I decide it as I do with reluctance, because, if the lady is resident here, as it has been found that she is, there would seem to be no good reason why her War Loan interest should not be taxed. It is never very satisfactory to decide, as I am deciding, that the statutory machinery fails in a particular case. Taking the words of the rule as they stand, I find myself compelled to construe them as the Commissioners have construed them, and the result is that the appeal of the Crown must fail and be dismissed.

Judgment accordingly.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *William Webb & Sons.*

(1) 14 App. Cas. 493; 2 Tax Cas. 490.

(2) 1927 S. C. 714; 13 Tax Cas. 30.

(3) [1929] 2 K. B. 236; 14 Tax Cas. 633.

J. R.

HAROLD WOOD BRICK COMPANY, LIMITED *v.* FERRIS.

1935
Jan. 24.

[1934. H. No. 837.]

Vendor and purchaser—Agreement for the purchase of freehold premises —Right of vendor to resell on purchaser's failure to complete— Repudiation of Agreement—Vendor's right to damages.

The defendant entered into an agreement to purchase freehold premises from the plaintiff. Clause 16 of the agreement provided: "Should the purchaser fail to complete the said purchase in accordance with this agreement any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the same and resell the property either by public auction or private contract subject to such stipulations as they might think fit." The defendant failed to complete the purchase in accordance with the agreement:—

Held, that the vendor was not limited to his right to resell under clause 16 of the agreement, but was also entitled to damages for breach of the agreement.

Laird v. *Pim* (1841) 7 M. & W. 474 followed.

Henty v. *Schröder* (1879) 12 Ch. D. 666 and *Hutchings* v. *Humphreys* (1885) 54 L. J. (Ch.) 650 explained and distinguished.

ACTION tried by Swift J. without a jury.

By an agreement dated August 15, 1933, made between John Casburn Pidgeon, the liquidator of the Harold Wood Brick Company, Ld., and Arthur Ferris, the liquidator agreed to sell and Arthur Ferris agreed to buy certain freehold land and buildings at Church Road, Harold Wood, Essex, together with the machinery, plant and utensils set out and named in the agreement. The agreement provided that the purchase price of the whole brick-making undertaking should be 9500*l.*, "upon completion on or after August 31, 1933," and it also provided that "completion should take place not later than September 15, 1933."

Clause 16 of the agreement provided: "Should the purchaser fail to complete the said purchase in accordance with this agreement any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the same and resell the property either by public auction or private contract subject to such stipulations as they might think fit."

The defendant failed to complete the purchase in accordance with the agreement. On November 13, 1933, the liquidator's solicitors wrote to the defendant saying: "In view of the fact that you have not completed the purchase in accordance with the contract, our clients instruct us to give you notice that they rescind the contract and are proceeding to sell the property by tender. They will hold you responsible in damages for any loss occasioned to them by your breach of the agreement."

Subsequently, the liquidator issued a writ claiming damages for breach of the agreement of August 15, 1933. It was agreed between the parties that if there should be any liability in law on the defendant to the plaintiff, the amount of the damages would be 4990*l*.

W. E. P. Done for the plaintiff.

Valentine Holmes for the defendant.

SWIFT J. [stated the facts and continued:] This action raises a pure point of law, which is whether or no, on the facts which are disclosed by the agreement and by the correspondence, about which there is no difference of opinion between the parties, the plaintiff is entitled to damages for breach of the agreement of August 15, 1933. It is said by Mr. Valentine Holmes on behalf of the defendant, that having regard to the terms of clause 16 an action for damages at common law will not lie. Mr. Valentine Holmes contends that the vendor is limited to his right to resell, and that he is not entitled to damages for breach of the agreement. I am unable to take that view of the rights of the parties. In support of his contention two cases were cited by Mr. Valentine Holmes. The first is *Henty* v. *Schröder* (1), in which the headnote is as follows: "After a decree for specific performance of an agreement against a purchaser who was unable to complete,—on a motion by the plaintiffs that the agreement might be rescinded, and all further proceedings in the action stayed except as to any application which might be made to the Court to award and assess the damages which the plaintiffs had sustained by the breach of the agreement. Held, that the plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach." Mr. Valentine Holmes contended that that was an authority for saying that where an agreement was rescinded no action for damages would lie; indeed no claim for damages could arise.

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(1) 12 Ch. D. 666.

The second case which Mr. Valentine Holmes cited was *Hutchings* v. *Humphreys*. (1) The headnote in that case is: "After a decree for specific performance of a contract which the party against whom the decree has been made is unable or neglects to carry into effect, the party in whose favour the decree was made is entitled to an order for rescission of the contract, retaining the benefit of any direction as to costs of the action, but not to damages or to occupation rent. He is also entitled to the costs of obtaining the order for rescission."

I do not think that the effect of those two cases is that which was contended for by Mr. Valentine Holmes. It does not seem to me that there is to be found anywhere a statement of law that where specific performance of a contract is ordered and that order is not obeyed there can be no claim for damages, but only a right to have the contract rescinded. It seems to me that all that those cases decide is that it was not appropriate in the years they were decided, in the Chancery Division, to put into one order an order rescinding the contract and an order providing for the assessment of damages for breach of contract. I cannot find anything in them which takes away the common law right laid down so clearly in *Laird* v. *Pim* (2) that on the failure of the purchaser to complete, the vendor is entitled to damages for breach of contract. The right to damages for breach of the agreement was recognized in 1925 in *York Glass Co., Ld.* v. *Jubb* (3) by the Court of Appeal, which, considering as the main point in the case the position of a lunatic who had contracted and who had repudiated, assumed and never questioned the right of a vendor to recover damages for breach of contract for the sale of land. Pollock M.R. said (4): "This is really a simple case in which we have to apply the old rule of

(1) 54 L. J. (Ch.) 650.
(2) 7 M. & W. 474.
(3) (1925) 134 L. T. 36.
(4) Ibid. 36, 40.

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common law as to damages, which is: 'Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.' There is abundant authority for that statement of the law. I am reading a passage from Parke B. in *Robinson* v. *Harman*. (1) Those damages are not confined to the actual margin between the sum realised and the contract price; there may be incidental expenses which have necessarily flowed from the breach of contract, and if those are to be taken into account the damages may be enhanced by an amount which will recompense the party who has suffered for the expenses which the breach of contract has entailed upon him. All these considerations have been before Lawrence J. He has applied his mind to the evidence before him, and he has come to the conclusion that a sum of 21,000*l.* is the right amount. I am not disposed at all to differ from him."

In this case I am relieved of the burden which was imposed on Lawrence J. in the case which I have just read. Here the parties have agreed that if there should be and there is any liability in law on the defendant to the plaintiff, the amount of the damages is 4990*l.* I need not consider how they have arrived at that figure; whether it is right or whether it is wrong is a matter for them, and of no interest for me. I am satisfied here that there is no answer in law to the plaintiff's claim. The defendant repudiated his contract, and the plaintiff accepted that repudiation. He said: That contract no longer exists, and now I want damages because you have broken it. In my opinion he is entitled to those damages, and I give judgment for the plaintiff for the agreed amount with costs.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Reynolds, Sons & Gorst.*

Solicitors for the defendant: *Andrew, Purves, Sutton & Creery.*

T. W. M.

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(1) (1848) 1 Ex. 850, 855.

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